(21,736.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 77.

THEODORE ALBERT MAYER, APPELLANT,

vs.

AMERICAN SECURITY & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF THEODORE J. MAYER, DECEASED; WASHINGTON LOAN & TRUST COMPANY, TRUSTEE, AND GEORGE WASHINGTON UNIVERSITY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1911.

In the Court of Appeals of the District of Columbia.

No. 1987.

THEODORE ALBERT MAYER, Appellant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor, &c., ET AL.

a Supreme Court of the District of Columbia.

No. 28094. Equity.

THEODORE ALBERT MAYER, Complainant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, WASHINGTON LOAN & TRUST COMPANY, Trustee, and GEORGE WASHINGTON UNIVERSITY, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-mentioned cause, to wit:

1 *Bill.*

Filed October 16, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28094. Equity.

THEODORE ALBERT MAYER, Complainant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, WASHINGTON LOAN & TRUST COMPANY, Trustee, and GEORGE WASHINGTON UNIVERSITY, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

The complainant respectfully states:

I.

That he is a citizen of the United States, and a resident of the City of Washington, District of Columbia.

II.

That the defendants, the American Security & Trust Company, and the Washington Loan & Trust Company, are corporations duly incorporated and organized under Acts of Congress of the United States, and engaged in business in the District of Columbia, with power to act as executors of wills and as trustees; that the
2 defendant, the George Washington University, is a corporation duly incorporated and organized under various Acts of Congress of the United States, and is conducting an educational institution in the District of Columbia; that the defendant, the American Security and Trust Company, is sued as executor and trustee under the last will and testament of Theodore J. Mayer, deceased, as hereinafter set forth; that the defendant, the Washington Loan & Trust Company, is sued in its own right as grantee under a certain deed from said Theodore J. Mayer, and as trustee under a certain trust agreement hereinafter mentioned; that the defendant, the George Washington University, is sued in its own right as the beneficiary under said trust agreement.

III.

That Theodore J. Mayer, late a citizen of the United States, and a resident of the District of Columbia, departed this life in said City and District, on the 16th day of March, 1907, possessed of a large amount of real and personal property other than the real estate with the improvements and personal property thereon hereinafter described and referred to as the Chevy Chase property and certain patent rights likewise hereinafter mentioned, leaving him surviving as his sole heir at law, a son, your complainant, and leaving a last will and testament bearing date the 15th day of February, 1907, which said last will and testament was thereafter, to-wit, on the 16 day of March, 1907, duly admitted to probate and record by the Supreme Court of the District of Columbia holding a Probate
3 Court; that in and by said last will and testament said testator constituted and appointed the defendant, the American Security and Trust Company the executor thereof and trustee thereunder, and letters testamentary have been duly issued to said Company by said Court, and, in virtue thereof, said Company, as executor and trustee under said will, has possessed itself of the real and personal estate of the said testator other than the Chevy Chase property and the patent rights heretofore and hereafter mentioned. A true copy of said last will and testament, duly certified, is hereto annexed, marked "Exhibit A", and prayed to be read as part hereof.

IV.

That in and by said last will and testament, as by reference thereto will appear, the said testator, after making various bequests in money, amounting in the aggregate to $80,000, by the twenty-first paragraph thereof, devised to your complainant his residence, No. 214 B Street, Southeast, and the adjoining lot and stable thereon, his horses, carriages, jewelry, pictures, etc., therein described, together with cer-

tain other personal property in said paragraph mentioned; and in and by said paragraph said testator further provided as follows:

"All the rest and residue of my estate, real, personal and mixed, which I now possess, or which may hereafter be acquired by me and wheresoever situate, I give, devise and bequeath unto the American
Security and Trust Company, a corporation existing and
4 doing business in the District of Columbia, under and by
virtue of the authority of the laws in force therein, its successors and assigns."

And said will further provided that all the estate devised and bequeathed by said residuary clause, should be held by said defendant, in trust to pay over to your complainant, until he attains the age of thirty-three years, the sum of $300 per month, and upon attaining the age of thirty-three years, to pay your complainant the sum of $15,000; and upon attaining the age of thirty-six years, to pay him the further sum of $15,000 and upon attaining the age of thirty-nine years, to pay the further sum of $30,000 and upon attaining the age of forty-two years, to pay him the further sum of $30,000, and upon attaining the age of forty-five years, the further sum of $30,000, and upon attaining the age of forty-eight years, to transfer, convey and pay over to your complainant, all of the trust funds and subject in its hands remaining, to be by him taken and held absolutely and in fee simple. Said clause of said will further provided, that in the event of the death of your complainant before attaining the age of forty-eight years, leaving issue surviving, an allowance should be made by said trustee for the maintenance and education of such child or children until they respectively attain the age of twenty-seven years, at which time said testator directed the trust as to such child or children to cease and the said trustee
to transfer and deliver to such child the trust estate, remain-
5 ing in its hands, or if more than one child, then to each of
them its distributive share of said estate. Said will further provided if such child or children should die before attaining the age of twenty-seven years, leaving no issue surviving, that his said estate should be distributed in the manner provided in the event your complainant should die before attaining the age of forty-eight years leaving no child or children surviving. And said testator in and by said will further provided that in the event of the death of your complainant before attaining the age of forty-eight years, leaving no child or children surviving, or descendant thereof, the said executor and trustee should pay over from the balance of his said estate then remaining, various legacies amounting in the aggregate to the sum of $205,000, and the balance, if any, in equal shares to various charitable and educational institutions therein mentioned.

V.

Upon information and belief your complainant charges that the real and personal estate of which said testator died seized and possessed and hereinbefore referred to, which came into the possession and control of the defendant, the American Security and Trust Company, as executor and trustee under said will, is more than suf-

ficient to satisfy and pay in full the several legacies directed to be paid by said testator, and all the just debts and funeral expenses of said testator and the expenses of administration of his estate.

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VI.

That shortly prior to the execution of said last will and testament, to-wit, on the 5th day of February, 1907, the said Theodore J. Mayer, being seized and possessed of a certain piece or parcel of real estate situated in Montgomery County, State of Maryland, known and described as Block numbered 27, in Section numbered 3, of a subdivision made by the Chevy Chase Land Company of Montgomery County, Maryland, as per plat recorded in Liber J. A. No. 36, at Folio 61, of the land records of said County, together with the improvements, machinery, furniture, etc., upon said premises, conveyed the same by deed in fee simple absolute to the defendant, the Washington Loan and Trust Company. A true copy of said deed, is hereto annexed, marked "Exhibit B," and prayed to be read as part thereof.

VII.

That at or about the time of the execution of said deed, the said defendant, the Washington Loan & Trust Company, executed a declaration in trust, signed and assented to by the defendant, the George Washington University, and the said Theodore J. Mayer, which said declaration of trust is of the following tenor and effect:

"Whereas, Theodore J. Mayer, of the City of Washington, D. C., did on the 5th day of February 1907, execute a certain deed in fee simple to property known as all of Block numbered Twenty-seven (27) in Section numbered Two (2) of a Subdivision made by the Chevy Chase Land Company of Montgomery County, Mary-

7 land, being as per plat recorded in Liber J. A. No. 36 at folio 61, of the Land Records of Montgomery County, Maryland, together with the improvements thereon, machinery plant and furniture thereon, to the Washington Loan & Trust Company, of Washington, D. C., and although the said deed purports to convey to said grantee an absolute title to the said property the same is held by the Washington Loan & Trust Company for the use and benefit of the George Washington University of Washington, D. C., in and upon certain trusts which are hereby declared to be as follows, that is to say:

In trust.

1. To convey said property, in fee simple, to the said George Washington University, when and at such time as the said University shall acquire a fee simple to the property known as the "Dean or Oak Lawn Property," located North of Florida Avenue, between 19th Street and Connecticut Avenue, in the County of Washington, District of Columbia, as a site for its University Buildings, and through the action of its Board of Trustees, shall abandon the idea of retaining the site known as the Van Ness property, now owned by it, as the location of the said University.

2. That upon the conveyance of the said "Dean or Oak Lawn

Property" to the George Washington University, said University shall agree in writing, by authority of its Board of Trustees,
8 to erect upon the said "Dean or Oak Lawn Property" as a part of its group of University Buildings, a building of stone and brick to be used for educational purposes and to be designated, "The Susanna Mayer Memorial."

3. That said Theodore J. Mayer having given an option to one Elmer Gates for the purchase of said property located at Chevy Chase, hereinbefore described, which option expires on the 15th day of April, 1907, for the sum of One Hundred and Eighty-five Thousand Dollars ($185,000), it is understood that in the event of this option being accepted the said The Washington Loan & Trust Company, shall have full power to deed the same to the said Gates, in fee simple, or his assigns, and receive the purchase money or its equivalent and to hold said money in and upon the same trusts as hereinbefore and hereinafter expressed for the property itself.

4. In the event that The George Washington University shall acquire the "Dean or Oak Lawn Property," pending the sale or the disposition of the Chevy Chase property, it shall be kept fully insured, in good repair and the hedges and lawns properly trimmed by The George Washington University.

5. The intent and purpose of the said Theodore J. Mayer by his conveyance to The Washington Loan & Trust Company is to donate to The George Washington University the land known as
9 the Chevy Chase property hereinbefore more particularly described for the uses and purposes of said University, only upon condition, however, that the said University shall acquire the "Dean or Oak Lawn Property," hereinbefore referred to, and shall use the same as the site of the George Washington University, and shall abandon the Van Ness property for this purpose, either by sale or direct notice action of its Board of Trustees, and with the proceeds of the sale of the said Chevy Chase land to erect upon the "Dean or Oak Lawn Property," a suitable educational building to be a memorial to the deceased wife of the said Mayer and to be designated "The Susanna Mayer Memorial," as aforesaid. This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said The George Washington University.

6. And upon this further trust in the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the Trustee, when said property, so as aforesaid conveyed to the Trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns.

In evidence of the acceptance of this trust by the George Washington University, it has caused this instrument to be signed by its President, attested by its Secretary, and its corporate seal
10 hereto affixed.

And, the said Theodore J. Mayer in approval of the terms

of the trusts herein expressed has also signed this instrument and affixed his seal hereto.

In testimony whereof, The Washington Loan & Trust Company has caused these presents to be signed by its President, attested by its Treasurer, and its corporate seal to be hereto affixed.

THE WASHINGTON LOAN AND TRUST COMPANY,
(Signed) By JOHN JOY EDSON, *President.*

Attested:
(Signed) ANDREW PARKER, *Treasurer.*

THE GEORGE WASHINGTON UNIVERSITY,
(Signed) By CHARLES W. NEEDHAM, *President.*

Attested:
(Signed) JOHN D. LARNER, *Sec'y.*"

VIII.

That at or about the time the deed to the Chevy Chase property was executed and delivered by the said Theodore J. Mayer to the said Washington Loan & Trust Company, hereinbefore mentioned, said Mayer, being at the time the owner of certain valuable patent rights, assigned the same to the defendant, The Washington Loan & Trust Company, to be held by said defendant upon the same trusts and subject to the same conditions set forth in said trust agreement dated February 5, 1907, concerning the Chevy Chase prop-
11 erty. Your complainant is unable to give an accurate or correct description of the patent rights so assigned and does not know and has no means of ascertaining except by and through the defendant, the Washington Loan & Trust Company, whether any other or further instrument in writing was executed concerning said patent rights and the particular terms of the trust upon which the same were to be held, and he therefore calls upon said defendant to discover and set forth in its answer hereto a full and correct list and description of the patent rights assigned to it and a full, true and correct copy of any instrument in writing affecting said patent rights or setting forth the terms of the trusts upon which the same were conveyed to and are now held by it.

IX.

That the defendant, the Washington Loan & Trust Company, trustee under the trust instrument, hereinbefore mentioned, and pursuant to the authority therein contained, determined and fixed Oct. 15, 1908, as the reasonable time and date within which the defendant, the George Washington University, should comply with the conditions and stipulations of said trust agreement, and duly notified the defendant, the George Washington University, that in case of failure on its part to comply with such conditions on or before said

date, that it would, as required by the terms of said trust agreement, reconvey said property to the person or persons lawfully entitled thereto.

X.

That the defendant, the George Washington University
12 at the date of the execution of said deed and of said trust agreement, and until long subsequent to the death of said Theodore J. Mayer, believed that it would be able to perform the conditions in said trust agreement mentioned whereby it would become entitled to a conveyance of said property, and in good faith, with the intention and purpose of securing such conveyance, abandoned and sold the Van Ness property, in said trust agreement mentioned, as the location of said University, and in the life time of said Theodore J. Mayer entered into negotiations for the purchase of the Dean or Oak Lawn property also in said agreement mentioned, and continued such negotiations in good faith until long subsequent to the death of said Theodore J. Mayer, and pursuant to the authority of its Board of Trustees, made an offer to purchase the same but the owners thereof have declined and refused to sell the same to the said University and therefore it has never been able to secure the said property, and, upon information and belief complainant avers, said University has in fact definitely and finally abandoned its purpose for the reason afore-said to acquire said property and because thereof, and because the time fixed by the defendant the Washington Loan & Trust Company, for the purchase of said Dean property has elapsed, and thereupon, it became and was and still is the duty of said Washington Loan & Trust Company, as required by the terms of said agreement, to reconvey said property, to the "heirs or assigns" of said Theodore J. Mayer.

13 XI.

Your complainant avers that he is the son and sole heir at law of said Theodore J. Mayer, and as such is the person to whom said property should be conveyed as provided by the terms of said trust agreement, and accordingly he has demanded of the defendant, the Washington Loan & Trust Company, to make such conveyance to him; nevertheless, your complainant charges, the said defendant, while expressing its desire to perform its full duty in the premises, refuses to make such conveyance until the right of your complainant thereto has been judicially determined, because, as it says, the defendant, the American Security & Trust Company, has notified it not to make such conveyance, claiming that the title to said trust property passed to it under the residuary clause of the last will and testament of said Theodore J. Mayer and is to be held by it as trustee under said will for your complainant until he attains the age of forty-eight years.

XII.

Your complainant charges that said Theodore J. Mayer, at the time of the execution of said will had been informed and believed, and this belief continued until his death, that the defendant, the

George Washington University, would be able to fulfill the conditions stipulated by said trust agreement, and become entitled to a conveyance of said property; that by the express terms of said trust agreement he directed said property, in the event of his death, to be reconveyed to his heirs or assigns; that said last will and testament was not in fact or in law an assignment of said property or
14 of any rights thereto and was not so intended by said testator; that default in the performance of the condition authorizing and requiring a reconveyance of said property did not occur until long subsequent to the death of the said Theodore J. Mayer; that the said testator was not possessed of such an interest in said property at the time of the execution of the said will or at the time of his death that could be devised by his last will and testament; that he was not possessed of any estate therein at the time of the execution of said will nor was any estate therein thereafter acquired by him during his lifetime; and even if it were the purpose of said testator to devise and bequeath said property by said last will and testament, which your complainant denies, nevertheless he says that said testator did not use apt or sufficient words for that purpose.

XIII.

Your complainant charges that the defendant, the George Washington University, by its failure to perform the conditions entitling it to a conveyance of said property has no longer any interest therein, but as said fact does not appear of record, said University is made defendant hereto for the purpose of having its default in said respect judicially established.

XIV.

That the said testator, in his lifetime, had given to one Elmer Gates an option in writing to purchase said Chevy Chase property and the improvements thereon and said patent rights as set forth in the trust agreement hereinbefore mentioned; that said option has, since the death of said testator, and with the consent of all
15 parties in interest, been extended from time to time and finally, on January 9, 1908, the same was, with like consent extended to June 15, 1908, in consideration of the payment by said Gates to the defendant, the Washington Loan and Trust Company, of the sum of $2500 as rental for said property between January 9, 1908, and the 15th day of June, 1908, with the agreement that, upon the payment by said Gates to the defendant, the Washington Loan and Trust Company, of the additional sum of $2500 as rental, on or before June 15, 1908, to further extend said option until December 15, 1908: That such additional sum has not been paid and said option has not been extended.

XV.

That since the death of said Theodore J. Mayer, a large amount of rent, amounting to approximately $6,000, has been collected from the tenant in possession, by the defendant, the Washington Loan and Trust Company; that said property is improved by various build-

ings containing a large amount of valuable machinery, furniture, and other personal property, in excess of $10,000.00 in value and the same has a substantial rental value; that it is necessary that some suitable person or corporation should be vested with authority to care for said property pending the determination of the rights of the parties in interest, to collect and hold the rents received on account thereof and to keep said property insured. Your complainant therefore charges that pending the disposition of this suit a receiver should be appointed and your complainant expresses his willingness that the defendant, the Washington Loan and Trust Company, should be appointed for that purpose.

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XVI.

Your complainant says that he is wholly without remedy except in this Honorable Court where alone his rights and the rights of the defendant, the American Security & Trust Company, as executor and trustee, arising out of the facts aforesaid, in reference to said real estate, personal property, and patent rights, can be determined.

Wherefore, your complainant prays—

First. That a writ of subpœna may be issued out of and under the seal of this court directed to said American Security and Trust Company, as executor and trustee under the last will and testament of Theodore J. Mayer, the Washington Loan and Trust Company, as trustee, and the George Washington University, whom your complainant prays may be made defendants thereto, commanding them to appear and answer the exigencies of this suit, but not under oath, answer under oath being expressly waived.

Second. That said last will and testament of Theodore J. Mayer, so far as may be necessary for the purposes of this suit, and said trust agreement executed by the Washington Loan and Trust Company, may be construed by this court and the rights of the parties hereto fully determined.

Third. That your complainant may be adjudged to be the owner of all the property covered by said trust agreement and conveyed to the defendant, the Washington Loan and Trust Company, together with rents which have been received on account thereof since the death of Theodore J. Mayer, and that said defendant, the Washington Loan and Trust Company, may be enjoined and directed to convey the same to your complainant.

17

Fourth. That the defendant, the American Security and Trust Company, may be enjoined from setting up any adverse title or claim of any nature either as executor and trustee under said last will and testament or otherwise to said property covered by said trust agreement or any part thereof.

Fifth. That in the meantime pending this suit a receiver may be appointed to take charge of said property, real and personal, collect the rents thereof and deal with the same generally in such manner as may be for the interest of the parties concerned, under the supervision and direction of this Honorable Court.

Sixth. That your complainant may have such other and further relief as the nature and circumstances of the case require and to this Honorable Court shall seem proper.

THEODORE ALBERT MAYER.

BRANDENBURG & BRANDENBURG,
Solicitors for Complainant.

DISTRICT OF COLUMBIA, *ss:*

Theodore A. Mayer, upon oath says: That he has read the foregoing bill of complaint by him subscribed and knows the contents thereof; that the things therein stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

THEODORE ALBERT MAYER.

18 Subscribed and sworn to before me this 15th day of October, 1908.

[SEAL.] LLOYD A. DOUGLASS,
Notary Public, D. C.

EXHIBIT "A."

I, Theodore J. Mayer, of the City of Washington, District of Columbia, being of sound and disposing mind, do make, publish and declare this my last will and testament, hereby revoking all former wills and codicils by me at any time made.

After all my just debts and funeral expenses shall be paid, I direct my executor to pay the following legacies:

1. I give and bequeath to each of the children of my brother-in-law, Florian R. Hitz, three thousand dollars ($3000).

2. I give and bequeath to the Aid Association for the Blind in the City of Washington, District of Columbia, the sum of ten thousand dollars ($10,000).

3. I give and bequeath to Bertha, Frida and Conrad Graf, the three children of my deceased sister Christine Graf of Rebstein, Canton, St. Gallen, Switzerland, two thousand dollars ($2000) each.

4. I give and bequeath to the two children of my deceased brother John Mayer of Leuchingen, Canton, St. Gallen, Switzerland, two thousand dollars ($2000) each.

5. I give and bequeath to the children of my youngest
19 sister Anna Catherine Schachtler, widow of Jacob Schachtler, now residing at Upland, Franklin County, Nebraska, two thousand dollars ($2000) each.

6. I give and bequeath to my cousin Katie Edemann, now residing in Jersey City Heights, New Jersey, the sum of One Thousand Dollars ($1000).

7. I give and bequeath to the Eastern Dispensary and Casualty Hospital for the benefit of poor patients in its various wards, in the City of Washington, District of Columbia, the sum of Ten Thousand Dollars ($10,000).

8. I direct in case any legatee or legatees (being natural persons) herein named shall depart this life before my death, that the legacy or legacies shall not lapse thereby, but that the sum shall be paid to the personal representative of such deceased legatee for his or her next of kin.

9. I give and bequeath to the Swiss Association of Washington, D. C., called the "Gruetli Verein", the sum of Two Thousand Dollars ($2000).

10. I give and bequeath to the Swiss Benevolent Association of Washington, D. C., the sum of Two Thousand Dollars ($2000), to be by said Association invested to the best advantage, and I direct that the income therefrom shall be by it distributed each year among the poor Swiss.

11. I give and bequeath unto the Children's Hospital in the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

12. I give and bequeath unto the National Homeopathic Hospital in the City of Washington, District of Columbia, for the benefit of the poor patients in its various wards, the sum of Five Thousand Dollars.

13. I give and bequeath unto the Washington City Orphan Asylum, in the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

14. I give and bequeath unto the German Orphan Asylum of the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

15. I give and bequeath unto the Washington Hospital for Foundlings, in the City of Washington, District of Columbia, the sum of Five Thousand Dollars ($5000).

16. I give and bequeath unto the Garfield Memorial Hospital, in the City of Washington, District of Columbia, for the benefit of poor patients in its various wards, the sum of Five Thousand Dollars ($5000).

17. I give and bequeath unto the Home for Incurables, in the District of Columbia, the sum of Ten Thousand Dollars ($10,000).

18. I give and bequeath unto the Emergency Hospital in the City of Washington, District of Columbia, for the benefit of the poor patients in its various wards, the sum of Five Thousand Dollars ($5000).

19. I give and bequeath unto my friend, Mrs. Mary J. Stephens, now residing at No. 402 "A" Street, Southeast, this city, the sum of Five Thousand Dollars ($5000), if she shall survive me, otherwise this legacy shall lapse and fall into the rest and residue of my estate.

20. I give and bequeath unto the Ruppert Home for Aged People at Anacostia, D. C., the sum of Ten Thousand Dollars ($10,000).

21. I give, devise and bequeath to my son, Theodore Albert Mayer, my residence No. 214 B Street, Southeast, and the adjoining lot and stable thereon, in square No. 761, in this city; I also give and bequeath to him all my horses, carriages, automobiles or other vehicles together with my furniture, jewelry, pictures, books, statu-

ary, piano, carpets, china and silverware, kitchen utensils, bedding, trunks, and valises, door and window hangings, wood and coal, music box, wines and liquors, all wearing apparel and clothing belonging to me and contained in No. 214 B Street, Southeast, or elsewhere belonging to me.

I also give and bequeath to him ten shares of the stock of the Central National Bank of Washington, D. C., and ten shares of the stock of the Union Trust Company of Washington, District of Columbia, and ten shares of the stock of the Norfolk and Washington Steamboat Company in the City of Washington, District of Columbia, and the sum of Fifteen Thousand Dollars ($15,000) in cash.

All the rest and residue of my estate, real, personal and mixed, which I now possess, or which may hereafter be acquired by me and wheresoever situate, I give, devise, and bequeath unto the American Security and Trust Company, a corporation existing and doing business in the District of Columbia under and by virtue of the authority of the laws in force therein, its successors and assigns.

In trust, however, for the following uses and purposes, and none other, to wit, to collect the income, rents, issues and profits thereof, and after payment therefrom of all taxes, insurance, expenses
22 for necessary repairs, and all other proper costs and expenses of managing the said estate and property, and apply the net income arising therefrom in the manner, to wit;

To pay over to my son, Theodore Albert Mayer, until he shall attain the age of thirty-three years, the sum of Three Hundred Dollars ($300) per month, retaining and accumulating all net income over and above said sum, until my son shall attain said age. Upon my son attaining the age of thirty-three years, I direct the payment of any portion of said income to my said son shall cease, and in lieu thereof I direct the Trustee hereunder, at that time to pay to him the sum of Fifteen Thousand Dollars ($15,000), and upon his attaining the age of thirty-six years I direct said Trustee to pay over to him the further sum of Fifteen Thousand Dollars ($15,000), and upon his attaining the age of thirty-nine years I direct said Trustee to pay over to him the further sum of Thirty Thousand Dollars ($30,000), and upon his attaining the age of forty-two years I direct said Trustee to pay over to him the further sum of Thirty Thousand Dollars ($30,000), and upon his attaining the age of forty-five years I direct the said Trustee to pay over to him the further sum of Thirty Thousand Dollars ($30,000), and upon his attaining the age of forty-eight years I direct the said Trustee to transfer, convey and pay over to him all of the trust fund and subject in its hands remaining, to be by him taken and held absolutely and in fee simple. I further direct that the receipt of my said son, either on account of income or payment of *of*
23 principal sums, shall be taken as a full *acquitance* and exoneration to said trustee on account of such payments.

In the event of the death of my said son before my death or before he shall attain the age of forty-eight years, leaving issue him surviving, I hereby direct my said Executor and Trustee, whom I hereby appoint the guardian and trustee of such child or children,

to apply from the net income of my estate a sum sufficient for his, her or their maintenance and education and support until such child or such children, if there be more than one, shall respectively attain the age of twenty-seven years, at which time I direct that the trust as to such child or children having attained the age of twenty-seven years, shall cease and determine and that the said trustee and guardian shall pay over, transfer and deliver to such child all of the trust estate in its hands remaining, or if more than one child, then to each its distributive share of said estate. Should such child, or if more than one child, all such children, die before attaining the age of twenty-seven years leaving no issue surviving, then and in such event, I direct that my estate shall be distributed in the manner provided in the event that my son shall die before attaining the age of forty-eight years leaving no child or children him surviving. Should such child or children of my son, or any of them, die before attaining the age of twenty-seven, leaving issue him, her, or them surviving, then and in such event I direct that such child or children shall take the share to which the parents would have been entitled. In the event, however, that my said son shall depart this life before me or before he shall attain the
24 age of forty-eight years, leaving no child or children him surviving, or descendants of such, then and in that event I direct my said executor and trustee to pay over from the balance of my estate then in its hands remaining the following legacies, to wit:

Fifteen Thousand Dollars ($15,000) to my brothers and sisters and their descendants, and to the descendants of such as are now dead and to their heirs respectively, their descendants taking and sharing equally between them the portion of said sum which would have gone to their respective parents living, under the provisions of this will.

And in addition to the bequests hereinbefore made, I, in the event above, give and bequeath unto the Children's Hospital of Washington, D. C., the sum of Twenty Thousand Dollars ($20,000); to the National Homeopathic Hospital of Washington, D. C., the sum of Ten Thousand Dollars ($10,000); to the Washington City Orphan Asylum the sum of Twenty Thousand Dollars ($20,000); to the George Washington Hospital of the City of Washington, District of Columbia, the sum of Ten Thousand Dollars ($10,000); to the Garfield Memorial Hospital of the City of Washington, District of Columbia, the sum of Ten Thousand Dollars ($10,000); to the German Orphan Asylum of the City of Washington District of Columbia, the sum of Ten Thousand Dollars ($10,000); to the Washington Home for Incurables of the City of Washington, District of Columbia, the sum of Thirty Thousand Dollars ($30,000) to the Washington Home for Foundlings in the City of Washington, District of Columbia, the sum of Twenty Thousand Dollars ($20,000); to the Aid Association for the Blind, now located
25 on E Street, Northwest, between Ninth and Tenth Streets, Washington, D. C., the sum of Twenty Thousand Dollars

($20,000.00); to the Emergency Hospital in the City of Washington, District of Columbia, *to* the sum of Ten Thousand Dollars ($10,000); to the Eastern Dispensary and Casualty Hospital in the City of Washington, District of Columbia, for the benefit of the poor patients in the several wards, the sum of Ten Thousand Dollars ($10,000) and to the Ruppert Home for Aged People in Anacostia, D. C., the sum of Twenty Thousand Dollars ($20,000).

Whatever may remain after the payment of said legacies I direct my executor and trustee to pay over to the Trustees for the Home for Incurables, the Aid Association for the Blind, the George Washington Hospital, the Eastern Dispensary and Casualty Hospital, the National Homeopathic Hospital, the Garfield Memorial Hospital, the Children's Hospital, and the Ruppert Home for Aged People, all in the City of Washington, District of Columbia, in equal shares.

I hereby authorize and empower my executor and trustee to continue any investment made by me and to invest any money of my estate in real estate in the District of Columbia, or in bonds or notes secured by first mortgage or deed of trust on real estate in said District, or in bonds of said District or of the United States, or in stocks or bonds of any incorporated railroad company which may have a continuous market value at par or upwards, and shall have paid interest or dividends promptly without defaulting or delaying for a period of five years or more immediately preceding such investment.

26 I also hereby authorize and empower my said executor and trustee to sell, transfer, and convey any or all of my estate personal or real, and wheresoever situate for the purpose of paying debts and legacies, or in their discretion for a better investment or for a change of investment, or for the more effectual carrying out of any of the provisions and directions of this my will, and I hereby exonerate any purchaser or purchasers from any obligation to see to the application of the purchase money.

I hold the following policies of insurance in the Equitable Life Assurance Society of New York, one dated August 28, 1895, #751,808, for $2000., and one dated August 28, 1895, #751,763 for $3000., and one dated August 28, 1895, #753,334 for $2000 upon the life of William H. Glading, and payable at his death; also a policy #124,703 in the New England Life Insurance Company, being what is known as a twenty year policy, for $10,000. upon the life of Elmer Gates. In order that these policies may not lapse for want of payment of premiums, I direct my executor and trustee to pay the necessary premiums to keep them in force, out of the income from my estate.

I hereby direct my executor to have my body embalmed and cremated, and the ashes deposited with the remains of my wife in the Congressional Cemetery in Washington, D. C.

I hereby nominate, constitute, and appoint the aforenamed American Security and Trust Company,the executor and trustee under this my last will and testament.

In witness whereof, I have hereunto set my hand and affixed my seal, this Fifteenth day of February A. D. 1907.

27 THEODORE J. MAYER. [SEAL.]

Signed, sealed, published and declared by Theodore J. Mayer, the above named testator, at Washington, D. C. on the day and date above mentioned, as and for his last will and testament in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

WARD THORON,
1741 *K Street N. W., Washington, D. C.*
WM. A. McKENNY,
Pa. Ave. & 15th St. N. W., City.

EXHIBIT "B."

This indenture made this 5th day of February 1907—

Witnesseth that Theodore J. Mayer, widower, party of the first part, for and in consideration of Ten (10) Dollars, in current money of the United States, and divers other valuable considerations, to him in hand paid by The Washington Loan and Trust Company, a corporation existing under the Laws of the United States relating to the District of Columbia, and doing business therein, party hereto of the second part, receipt of which, at the delivery hereof, is hereby acknowledged, does grant and convey unto and to the use of the said The Washington Loan and Trust Company, a corporation as aforesaid, its successors and assigns, the following described land and premises, and improvements thereon, with the easements and

28 appurtenances thereunto belonging, and situate and lying in Montgomery County, State of Maryland, and being known and described as all of Block numbered Twenty-seven (27) in Section numbered Two (2) of a Subdivision made by The Chevy Chase Land Company of Montgomery County, Maryland, being as per plat recorded in Liber J. A. No. 36 at folio 61, of the Land Records of Montgomery County, Maryland. Also all the personal property, machinery and other paraphernalia now used in the buildings erected thereon, or upon the ground itself, and now in the possession of Elmer Gates, the tenant upon said property.

To have and to hold the said land and premises, together with the improvements thereon and all the personal property, as aforesaid, with the easements and appurtenances, unto and to the use of the said The Washington Loan and Trust Company, party of the second part, its successors and assigns.

In testimony whereof I have hereunto set my hand and seal on the day and year first hereinbefore written.

(Signed) THEODORE J. MAYER. [SEAL.]

Signed, sealed and delivered in the presence of—

(Signed) EDWIN C. BRANDENBURG.
" LLOYD A. DOUGLASS.

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on this 5th day of February, 1907, before the subscriber a Notary Public in and for the District of Columbia, personally appeared Theodore J. Mayer, widower, the grantor
29 named in the foregoing and annexed deed to The Washington Loan and Trust Company, a corporation existing under the laws of the United States relating to the District of Columbia, and did acknowledge said deed to be his act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal this 5th day of February 1907.

(Signed) LLOYD A. DOUGLASS,
[SEAL.] *Notary Public, D. C.*

(Copy.)
G.

(Endorsed:) 42. Deed. Paid. Clerk's Office. Theodore J. Mayer, Mont. Co. Md. The Washington Loan and Trust Company, a corporation. Received this 18th day of Feb'y 1907, 12:18 P. M., to be recorded and same day was recorded in Liber No. 192, folio 301, one of the Land Records of Montgomery County, Md., and examined per John L. Brunett, Recorder.

30 *Separate Answer of the American Security and Trust Company.*

Filed November 27, 1908.

In the Supreme Court of the District of Columbia.

No. 28,094. In Equity.

THEODORE ALBERT MAYER
vs.
AMERICAN SECURITY AND TRUST COMPANY ET AL.

For answer unto said Bill of Complaint, or unto so much thereof as it is advised it is material and proper for it to make answer unto, it states and avers as follows:

I AND II.

It admits the truth of the statements of these two paragraphs in respect of the residence of the complainant, the corporate domicile of the several defendants, and the capacity in which the complainant sues and the defendants are sued.

III.

It admits that said Theodore *A*. Mayer died March 12th, 1907, possessed of a large amount of real and personal property, other than said Chevy Chase property mentioned in said Bill, leaving his son,

said complainant, surviving him, his sole heir-at-law, and leaving a last will and testament dated February 15, 1907, which has been duly admitted to probate and record; and that this defendant is named as trustee and executor therein and has accepted said
31 trusteeship and duly qualified as executor thereof and that letters testamentary have been issued to it.

It admits that as executor and trustee under said will it has possessed itself of the real and personal property which was of said testator, other than said Chevy Chase property and said patent rights.

IV.

It presumes that the provisions of said will, as set forth in this paragraph of the Bill, are correctly stated, but for greater certainty prefers that reference should be had to the will itself.

V.

It admits that the real and personal property of said decedent which came into possession of this defendant is more than sufficient to satisfy and pay in full the several legacies directed to be paid by the testator and all the just debts and funeral expenses of said testator and the expenses of administration.

VI.

It admits that said Theodore J. Mayer, by deed dated February 5, 1907, conveyed said Chevy Chase property described in this paragraph of the Bill, to said defendant, The Washington Loan and Trust Company, absolutely in fee simple, and that said Exhibit B is a true copy of said deed.

VII.

It admits the execution of the declaration of trust by said Washington Loan and Trust Company set forth in this paragraph
32 of the Bill, but for greater certainty prefers that the original be produced.

VIII.

It admits the averments in this paragraph of the Bill in respect of the assignment of said patent rights to said Washington Loan and Trust Company upon the same trusts as said Chevy Chase real estate.

IX.

It admits, on information and belief, that said Washington Loan and Trust Company determined and fixed October 15, 1908 as the reasonable time by which the defendant The George Washington University should comply with the conditions of said trust agreement, so notified said University, and that in default thereof it would reconvey said property to the person or persons lawfully entitled thereto.

X.

It is advised that it is not required to answer the averments of this paragraph in respect of said University, but admits that the time for said University to comply with the terms of said declaration of trust has elapsed and that it is the duty of said Washington Loan and Trust Company to convey said property in accordance with the trusts upon which it held the same.

XI.

It admits that complainant is the son and sole heir-at-law of said testator.

As it had been advised by counsel that the property in-
33 cluded in said declaration of trust and held thereunder by said Washington Loan and Trust Company, upon default made by said University in acquiring the same, passed to this defendant under the residuary clause in said will, it so notified said Washington Loan and Trust Company, and it now, on the advice of its counsel, claims, as it deems it is its duty to do, that the same did so pass to this defendant, and that said Washington Loan and Trust Company should be decreed to convey, assign and deliver said property to it, as trustee under said will.

XII.

It is advised that it is not required to answer the averments of this paragraph of the Bill, alleging as it does immaterial and irrelevant matters of fact and matters of law.

XIII.

Upon information and belief, it admits that under said declaration of trust said University no longer has any interest in said property.

XIV.

Upon information and belief, it admits the averments of this paragraph of the Bill in respect of the said option to said Gates, the extension thereof and that said option has expired.

XV.

As the averments of this paragraph of the Bill relate to the mat-
ter of the appointment of a receiver of said property, it sub-
34 mits the same to such action of the Court as it may deem lawful and proper.

XVI.

It is advised that as the averments of this paragraph relate solely to matters of law it is not required to answer the same.

XVII.

It is advised by counsel, and therefore avers, that the several legatees named in the residuary clause of said will are necessary and

essential parties; and that unless they are made parties the Court is without jurisdiction to pass any decree in the premises, except to dismiss said Bill.

And having answered said Bill fully it prays that it may have the same advantage as if it had demurred thereto.

[SEAL.] AMERICAN SECURITY & TRUST CO.,
By CHARLES J. BELL, *President.*

Attest:
JAMES F. HOOD,
Secretary.
WM. F. MATTINGLY,
Sol'r for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

I, Charles J. Bell, do solemnly swear that I am the President of The American Security and Trust Company, a body corporate and one of the defendants in the above entitled cause; that the
35 foregoing answer was subscribed by me in the name of said corporation; that I have read the foregoing answer and know the contents thereof; that the facts therein stated as of personal knowledge are true, and those stated upon information and belief I believe to be true.

CHARLES J. BELL,

Subscribed and sworn to before me this 24th day of Nov., A. D. 1908.

[SEAL.] HARRY W. FINNEY,
Notary Public, D. C.

Separate Answer of the Washington Loan and Trust Company.

Filed December 16, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 28094.

THEODORE ALBERT MAYER, Complainant,
vs.
THE AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, *et al.*, Defendants.

For answer to so much and such parts of the bill of complaint in this cause filed, as this defendant deems it necessary and
36 proper for it to answer unto, it answering says:

1, 2. It admits the allegations contained in the first and second paragraphs of the bill of complaint.

3. Having no personal knowledge of the matters and things set forth in the third paragraph of the bill of complaint this defendant can neither admit nor deny the same.

4. This defendant admits the truthfulness of the allegations contained in the fourth paragraph of the bill of complaint and says that the quotations from the last will and testament of Theodore J. Mayer, deceased, set forth in said paragraph are correctly taken from said last will and testament.

5. This defendant has no knowledge that will enable it either to admit or deny the allegations contained in the fifth paragraph of the bill of complaint, but presumes that the same are correctly stated therein.

6. This defendant admits the allegations of the sixth paragraph of the bill of complaint, to wit, that the property at Chevy Chase, Maryland, belonging to the said Theodore J. Mayer, deceased, was, prior to the execution of his last will and testament, to wit, the 5th day of February 1907, conveyed by a deed in fee simple to this defendant.

7. This defendant admits the allegations contained in the seventh paragraph of the bill of complaint.

8. For answer to the eighth paragraph of the bill of complaint this defendant says, that at or about the time the deed to the Chevy Chase property was executed and delivered to it by the said Theodore J. Mayer, the said Mayer transferred, assigned, set over and
37 delivered to this defendant to be held by it upon the same trusts and conditions, as set forth in the trust agreement of February 5th, 1907, concerning the Chevy Chase property, and more particularly set forth in the seventh paragraph of the bill, certain patent rights said to have been owned by the said Theodore J. Mayer, which said assignment was duly recorded in the United States Patent Office at the City of Washington, D. C.; and this defendant files herewith and prays that the same may be taken and read as a part hereof a full and complete copy of said assignment containing a list of the patents covered thereby, which is marked, "Exhibit 'A'," to the answer of the defendant, The Washington Loan & Trust Company, Trustee; and this defendant says that said assignment is still held by it in accordance with the terms and conditions of the declaration of trust hereinbefore referred to.

9. This defendant admits the allegations contained in the ninth paragraph of the bill of complaint.

10. For answer to the tenth paragraph of the bill this defendant says that according to the terms of the declaration of trust hereinbefore referred to, the time within which The George Washington University was to acquire by purchase the, "Dean or Oak Lawn," property, was left to the discretion of this defendant, the intention of the grantor, the said Theodore J. Mayer, being, as this defendant interpreted the same, that it should use its discretion in allowing the defendant, The George Washington University, a reasonable length of time within which to dispose of the so-called Van Ness property, and to purchase the "Dean or Oak Lawn" property, and in accord-

ance with the exercise of this discretion this defendant, con-
38 sidering that a reasonable time had elapsed, called upon the said defendant. The George Washington University, in writing, by letters dated the 13th day of February 1908, the 22nd day of May 1908, and the 10th day of August 1908, copies of which letters are hereto attached and made part hereof, marked, "Exhibits 'B,' 'C' and 'D'," of this defendant's answer to the bill of complaint in this cause filed, to fix a time certain within which it would either comply with the conditions of the declaration of trust aforesaid, in respect to the said Chevy Chase property and the patents aforesaid, or abandon the same that this defendant might convey the property, as required by the terms of said declaration of trust, to the heirs and assigns of the said Theodore J. Mayer, now deceased. In said letter of the 10th day of August 1908, this defendant fixed the date within which the University must act as the 15th day of October 1908, and the said University in response to said last mentioned communication, through its President, Charles W. Needham, under date of August 12th, 1908, a copy of which is filed herewith marked "Defendant's Exhibit 'E'," advised this defendant that the time fixed seemed reasonable. Subsequently, to wit, on or about the 15th day of October 1908, this defendant received from Charles W. Needham, President of The George Washington University, a communication of that date in which it was definitely stated that the University had abandoned the idea of acquiring the "Dean or Oak Lawn" property for the reason that the owners of said property refused to sell the same, thus making the performance of the condition prescribed by the said Theodore
39 J. Mayer, in the declaration of trust, impossible so far as the said University was concerned, a copy of which said letter is filed herewith marked, "Defendant's Exhibit 'F'," and prayed to be taken and read as a part hereof. Thereupon this defendant advised The American Security & Trust Company, and the complainant, through their respective attorneys, of the conclusion of the University and that this defendant was ready and willing at any time to comply with the requirements of said declaration of trust by conveying the property aforesaid, to wit, the Chevy Chase property, the contents of the buildings thereon, and the said patent rights, to the heirs and assigns of the said Theodore J. Mayer, deceased.

11. For answer to the eleventh paragraph of the bill of complaint this defendant says that it is true as therein alleged that the complainant, the sole heir and son of the said Theodore J. Mayer, deceased, has made a demand upon it to convey the property aforesaid to him; it admits further that it is true that while expressing its desire to perform its duties in the premises, it has refused to make such conveyance until the full right of the complainant to have such conveyance made to him is judicially determined. This defendant avers that The American Security & Trust Company, Executor and Trustee under the last will and testament of Theodore J. Mayer, deceased, has also made demand upon it for a conveyance of said property, and this defendant has advised The American Security & Trust Company, Executor and Trustee, as aforesaid, that it is ready

and willing to make a conveyance of the property to such grantee as may be judicially determined by the Court. This de-
40 fendant has been compelled to take this position by reason of the conflicting claims of the complainant and the said The American Security & Trust Company.

12. For answer to the twelfth paragraph of the bill of complaint this defendant says, that the matters and things set forth in said paragraph, except the allegation that the default in the performance of the condition authorizing and requiring a reconveyance of the said property did not occur until subsequent to the death of the said Theodore J. Mayer, are conclusions of law which this defendant is advised and believes it is not necessary for it to answer, other than to say that it is now and has been at all times since the abandonment of the said property by the said defendant, The George Washington University, ready and willing to convey the same to either the complainant, or the defendant, The American Security & Trust Company, Executor and Trustee as aforesaid, as soon as it may be judicially determined to which of the two parties the said property should be conveyed.

Further answering said paragraph twelve this defendant says that it entertained the belief that as said Mayer in said Declaration of Trust provided that in the event The George Washington University should not be able to comply with the conditions of the trust that the said property should be conveyed to his, "heirs or assigns," which this defendant originally construed to mean his son, the complainant herein, and this view was expressed in a letter addressed to this defendant by the President of said University under date of July 23d 1907, a copy of which is filed herewith marked, "De-
41 fendant's Exhibit 'H'."

13. This defendant admits the allegations contained in the thirteenth paragraph of the bill of complaint.

14, 15. For answer to the fourteenth and fifteenth paragraphs of the bill of complaint this defendant says that it admits that at the time of the transfer of the property aforesaid, to it, by the said Theodore J. Mayer, it was subject to an option given by the said Mayer in his lifetime, in writing, to one Elmer Gates, and that since the death of the said testator and with the consent of all parties in interest this option has been extended from time to time by this defendant to the 15th day of June 1908, for which extension the said Gates paid to this defendant the sum of Twenty-five Hundred (2500) Dollars as rental for said property between January 9th, 1908 and the 15th day of June 1908, with the agreement that upon the payment of an additional sum of Twenty-five Hundred (2500) Dollars on or before the 15th day of June 1908 the said option would be extended until the 15th day of December 1908. This defendant says that such additional sum has not been paid by the said Gates, and that steps have been taken by it to move said Gates from said property and regain possession thereof, by proper proceedings instituted in the Courts of Montgomery County, State of Maryland, in which County and State the property is located; and this defendant expects that within a very short time it will be in either

absolute possession of said property, or a further money consideration will be received by and with the consent of all parties in interest for the further extension of said agreement, but such extension will not be made by this defendant unless it be by and with the consent of all parties in interest, as aforesaid.

42

This defendant admits that it has received, since the property aforesaid came into its possession, the sum of $7023.93, and that it has expended for legitimate purposes in the care and preservation of said property, as well as for insurance, taxes, etc., a sum aggregating $4306.59, and that at the time of the filing of this answer it has in its possession to the credit of said trust fund the sum of $2717.34, subject to such further fees and allowances as this defendant may hereafter be entitled to receive; and this defendant files herewith an itemized statement of its account, marked "Exhibit 'G'," and prays that the same be taken and read as a part of its answer to the bill of complaint in this cause filed, in order that the same may be before the Court at the hearing of this cause, and it stands ready and willing to comply with such order as may be passed herein by the Court in respect to the disposition of the property, real and personal, in its possession and held under the declaration of trust aforesaid.

16. For answer to the sixteenth paragraph of the bill of complaint this defendant says that said allegation being an allegation of a legal conclusion it can neither admit nor deny the same.

Having fully answered this defendant prays to be hence dismissed with its reasonable costs.

THE WASHINGTON LOAN & TRUST CO., *Trustee,*
By JNO. JOY EDSON, *President.*

JOHN B. LARNER,
Att'y for Def'd't.

43

John Joy Edson being first duly sworn deposes and says that he is the President of The Washington Loan & Trust Company; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and as to those stated upon information and belief he believes them to be true.

JNO. JOY EDSON.

Subscribed and sworn to before me this 16th day of December, 1908.

[SEAL.] ALFRED B. DENT
Notary Public.

DEFENDANT'S EXHIBIT "A."

Whereas I, Theodore J. Mayer, of the City of Washington, District of Columbia, hold by assignment from Elmer Gates, the following letters patent and applications for letters patent:

1. Apparatus for producing or developing Ozone, application

made Jan. 31, 1899, Serial No. 704,038; one undivided half interest; abandoned.

2. Storage Batteries; charging and discharging; application made Jan. 31, 1899, Serial No. 704,067; one undivided half interest; abandoned.

3. Electrical Soldering Irons, application made Nov. 30, 1898, Serial No. 697,931; exclusive right, title and interest; abandoned.

44 4. Storage batteries, charging and discharging; filed Jan. 31, 1899; Serial No. 704,067; one undivided half interest; abandoned; see No. 2.

5. Process for making Radiographs and apparatus therefor, Patent No. 653,383, July 10, 1900; exclusive right, title and interest.

6. Apparatus for producing or developing Ozone, applica— made Jan. 31, 1899, Serial No. 704,038; one undivided half interest; abandoned; see No. 1.

7. Process of simultaneously cooling air and purifying and regulating its moisture, and apparatus therefor; Patent No. 636,255, dated Nov. 7, 1899; exclusive right, title and interest.

8. Apparatus for simultaneously purifying, cooling and regulating moisture of air, Patent No. 636,256, dated Nov. 7, 1899; exclusive right, title and interest.

9. Production of Alloys, Patent No. 729,752, dated June 2, 1903; exclusive right, title and interest.

10. Mechanically operated musical instruments, filed Dec. 19, 1898, Serial No. 699,676, exclusive right, title and interest, not our case no record.

11. Means for varying tone quality, filed Dec. 10, 1898, Serial No. 698,897; not our case no record.

12. Producing tones electrically, filed Dec. 19, 1898, Se-
45 rial No. 699,675, abandoned; exclusive, right, title and interest.

13. Apparatus for electric generation, filed June 23, 1899, Serial No. 721,599, exclusive right, title and interest, not our case, no record.

14. Apparatus for generating Ozone, filed Sept. 23, 1898, Serial No. 691,693, entire right, title and interest; abandoned.

15. Shirts, filed Aug. 19, 1898, Serial No. 688,998, entire right, title and interest, abandoned.

16. Telescope, filed Nov. 31, 1897, Serial No. 657,710, entire right, title and interest, abandoned.

17. Optical apparatus, filed June 21, 1898, Serial No. 684,047, entire right, title and interest; abandoned.

18. Mega-Microscope, filed Aug. 19, 1898, Serial No. 688,996, entire right, title and interest; abandoned.

19. Trowsers, filed Aug. 19, 1898, Serial No. 688,997, entire right, title and interest, abandoned.

20. Process of making Radiographs and apparatus, filed Sept. 26, 1898, Serial No. 691,909; Patent No. 653,383, entire right, title and interest; See No. 5.

21. Electric soldering iron, filed Nov. 30, 1898, Serial No.
46 697,931, entire right, title and interest, abandoned; See No. 3.

22. Apparatus for producing Ozone, filed Jan. 21, 1899, Serial No. 704,038; entire right, title and interest, abandoned, See No. 1.

23. Storage batteries, filed Jan. 31, 1899, Serial No. 704,067, entire right, title and interest; abandoned, See No. 2.

24. Apparatus for cooling and purifying air, filed June 19, 1899, Serial No. 721,174, entire right, title and interest; abandoned.

25. Pneumatic Suction Sweeper, about to make application; Specification executed Dec. 7, 1899; entire, right, title and interest; not our case; no record.

26. Electrically operated sheeding mechanism for looms, Patent No. 565,446, dated Aug. 11, 1896; entire right, title and interest.

27. Electrically operated Jacquard mechanism for looms, Patent No. 565,447, dated Aug. 11, 1896; entire right, title and interest.

28. Electrically operated reed for looms, Patent No. 565,448, dated Aug. 11, 1896, entire right, title and interest.

29. Magnetic shuttle motion for looms, Patent No. 565,449,
47 dated August 11, 1896, entire right, title and interest.

30. Electro-static separation, Patent No. 653,343; dated July 10, 1900, Serial No. 739,006, entire right, title and interest.

31¼. Dia-Magnetic separation, Patent No. 653,344 dated July 10, 1900, Serial No. 739,007, entire right, title and interest.

32. Diamagnetic separation, Patent No. 653,345, July 10, 1900, Serial No. 739,008, entire right, title and interest.

33. Magnetic separation, Patent No. 653,346, dated July 10, 1900, Serial No. 739,009, entire right, title and interest.

34. Diamagnetic separation, Patent No. 653,342, dated July 10, 1900, Serial No. 731,762, entire right, title and interest.

35. Recovering rubber from Milk Weed and like plants, filed Jan. 4, 1900, (Serial No. 401, allowed March 20, 1900), entire right, title and interest; forfeit.

36. Diamagnetic separator, Patent No. 731,038, dated June 16, 1903, Serial No. 6,944, entire, right, title and interest.

37. Diamagnetic separators Patent No. 731,035, dated June
48 16, 1903, Serial No. 6,945, entire right, title and interest.

38. Diamagnetic separators Patent No. 731,039, dated June 16, 1903, Serial No. 6,946, entire right, title and interest.

39. Diamagnetic separators filed March 1, 1900, Serial No. 6,947, entire right, title and interest; abandoned.

40. Diamagnetic separators, Patent No. 731,036, dated June 16, 1903, Serial No. 6,948, entire right, title and interest.

41. Diamagnetic separators, Patent No. 731,040, dated June 16, 1903, Serial No. 9,265, and renewal No. 138,122, entire, right, title and interest.

42. Diamagnetic separators, Patent No. 731,041, dated June 16, 1903, Serial No. 9,266, entire right, title and interest.

43. Diamagnetic separators, Patent No. 731,042, dated June 16, 1903, Serial No. 9,267, entire right, title and interest.

44. Diamagnetic separation, Patent No. 731,044, June 16, 1903, Serial No. 12,901, entire right, title and interest.

45. Diamagnetic separation, Patent No. 731,045, dated June 16, 1903, Serial No. 12,902, entire right, title and interest.

49 46. Separating Gold from magnetic sands, filed March 19, 1900, Serial No. 9,268, entire right, title and interest.

47. Separating Gold from Magnetic sands, Patent No. 662,409, dated Nov. 27, 1900, Serial No. 9,269, entire right, title and interest.

48. Separating Gold from Alluvial Deposits, Sea Sand etc., filed March 21, 1900, Serial No. 9,521, entire right title and interest, pending last action, June 24, 1904.

49. Separating Diamagnetic material from sand etc., Patent No. 731,043, June 16, 1903, Serial No. 12,899, entire right, title and interest.

50. Application for excavating and separating, filed April 14, 1900, Serial No. 12,900, entire right, title and interest, not our case, no record.

51. Magnetic separation, Patent No. 662,410, dated Nov. 27, 1900, Serial No. 12,903, entire right, title and interest.

52. Magnetic separation, Patent No. 622,411, dated Nov. 27, 1900, Serial No. 12,904, entire right, title and interest.

53. Magnetic separator, Patent No. 662,412, dated Nov. 27, 1900, Serial No. 12,905, entire right, title and interest.

50 54. Magnetic separator, Patent No. 662,413, dated Nov. 27, 1900, Serial No. 12,903, entire right, title and interest.

55. Smelting magnetic iron ore and the like, filed July 12, 1900, Serial No. 23,366, entire right, title and interest, abandoned.

56. Magnetic separator, Patent No. 662,414, dated Nov. 27, 1900, Serial No. 23,370, entire right, title and interest.

57. Alloys, filed June 26, 1899, Serial No. 721,897, one undivided third; forfeited, four applications filed in lieu thereof, see items Nos. 9, 67, 68 and 69.

58. Magnetic separation, Patent No. 662,410, dated Nov. 27, 1900, Serial No. 12,903, grants license, see No. 51.

59. Magnetic separation, Patent No. 662,411, dated Nov. 27, 1900, Serial No. 12,904, grants license, see No. 52.

60. Magnetic separator, Patent No. 662,412, dated Nov. 27, 1900, Serial No. 12,905, grants license, see No. 53.

61. Magnetic separator, Patent No. 662,413, dated Nov. 27, 1900, Serial No. 12,906, grants license, see No. 54.

62. Magnetic separator, Patent No. 662,414, dated Nov.
51 27, 1900, Serial No. 23,370, grants license, see No. 56.

63. Smelting magnetic iron ore, filed July 12, 1900, Serial No. 23,366, one undivided third, abandoned.

64. Separating gold from Magnetic Sands, Patent No. 662,409, Nov. 27, 1900, Serial No. 9,269, entire right, title and interest.

65. Sub-Aqueous magnetic separator, Patent No. 729,753, dated June 2, 1903, Serial No. 42,795, renewal No. 130,153, entire right, title and interest.

66. Method of Agglomerating Magnetic Ores, Patent No. 780,716,

Jan. 24, 1905, Serial No. 43,202, renewal No. 130,154, entire right, title and interest.

67. Alloy casting, Patent No. 729,756, dated June 6, 1903, application executed Jan. 9, 1903, entire right, title and interest.

68. Method of casting alloys, Patent No. 729,754, June 2, 1903, application executed Jan. 9, 1903, entire right title and interest.

69. Apparatus for casting alloys, application executed Jan. 9, 1903, Patent No. 729,755, dated June 2, 1903, entire right, title and interest.

70. Method of extracting rubber from Milkweed, application executed Jan. 9, 1903, Serial No. 138,819, entire right, title and interest, pending last action March 24, 1904.

52 71. Cooling apparatus for explosive engines, application executed Dec. 17, 1902, Serial No. 138,818, entire right, title and interest, pending last action June 10, 1905.

72. Diamagnetic separator, application executed Jan. 1903, Patent No. 731,037, June 16, 1903, entire, right title and interest.

Foreign Patents of Elmer Gates Assigned to Theodore J. Mayer.

England.

1. No. 17781, Aug. 11, 1896, Shedding Mechanism for Looms, entire right, title and interest.

2. No. 17782, Aug. 11, 1896, Shedding Mechanism for Looms, entire right, title and interest.

3. No. 17783, Aug. 11, 1896, Beating up Mechanism for Looms, entire right, title and interest.

4. No. 17784, Aug. 11, 1896, Shuttle operating device for looms, entire right, title and interest.

5. No. 12,599, Sept. 29, 1900, separation of mixed granular or pulverized substance, entire right, title and interest.

6. No. 12,600 same as No. 5.

53 7. No. 12,601 same as No. 5.

Canadian.

1. No. 68,576, Aug. 30, 1900, Serial No. 91,010, July 10, 1900, diamagnetic separation, entire, right title and interest.

2. No. 68,576, Aug. 30, 1900, Serial No. 91011, July 10, 1900, Electro-Static and Combined Electro-Static and Biamagnetic systems, entire right, title and interest.

3. No. 69,036, Oct. 17, 1900, Serial No. 91012, July 10, 1900, separating particles of conducting material from mixtures containing them, entire right, title and interest.

4. Patents Nos. 54,240; 54,241; 54,242; and 54,243, Dec. 2, 1896, looms, entire right, title and interest.

New Zealand.

1. Patent Nos. 12,897; 12,898 and 12,899, Aug. 2, 1900, separation of mixed granular and pulverized substances, entire right, title and interest.

And whereas, The Washington Loan & Trust Company a corporation duly organized, desires to acquire the sole and entire interest in and to said letters patent and application for letters patent,

Now, therefore, These presents do witness that I, Theodore
54 J. Mayer, in consideration of One ($1.00) Dollar to me paid by the said Washington Loan & Trust Company, the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over and deliver unto the said Washington Loan & Trust Company, the sole, entire and undivided right, title and interest in and to all of said letters patent and application for said letters patent, to have and to hold during and for the terms for which said letters patent are or may be granted, and for and during the terms for which the letters patent may be granted upon said applications, in trust, nevertheless, for the following purposes: and

I, the said Theodore J. Mayer, do covenant and agree that upon request I will make, execute and deliver to the said Washington Loan & Trust Company, all further assignments or other instruments that the said Washington Loan & Trust Company may be advised by counsel are necessary or proper to invest in the said Washington Loan & Trust Company, the legal title in and to said letters patent and the inventions described therein.

In witness whereof, I, the said Theodore J. Mayer, do set my hand and seal this 19th day of February A. D. 1907.

(Signed) THEODORE J. MAYER. [SEAL.]

Witness:

(Signed) EDWIN C. BRANDENBURG.
EUGENE BLAIR.

55 DEFENDANT'S EXHIBIT 'B.'

FEBRUARY 13, 1908.

Dr. Charles W. Needham, President, The George Washington University.

MY DEAR DR. NEEDHAM: We have received a communication from Messrs. Brandenburg and Brandenburg, Attorneys at Law, for Mr. T. A. Mayer, asking and insisting upon this Company, as Trustee, fixing upon a date that is considered a reasonable time to terminate the trust made by his father for the benefit of the University.

The matter was brought before our Trust Committee, today, and I was instructed to request the University to consider the matter and inform this Company, as Trustee, what they decide would be a reasonable time, to enable us to advise Messrs. Brandenburg and Brandenburg.

Yours very respectfully,

(Signed) JOHN JOY EDSON, *President.*

56 DEFENDANT'S EXHIBIT 'C.'

MAY 22, 1908.

Dr. Charles W. Needham, President, George Washington University, Washington, D. C.

DEAR SIR: This Company, as Trustee for certain property in Chevy Chase, under a deed in trust from the late Theodore J. Mayer, has been notified by Mr. Theodore A. Mayer, to request that the George Washington University determine definitely, at the meeting of their Board, on June 3rd, next, their purpose in reference to this property.

Mr. Mayer states that he feels entitled to a definite statement at that time, in order that his future actions may be governed accordingly.

Yours very respectfully,
(Signed) FRED'K. EICHELBERGER,
Trust Officer.

57 DEFENDANT'S EXHIBIT 'D.'

WASHINGTON, D. C., *August* 10, 1908.

Dr. Charles W. Needham, Cazenovia, New York.

DEAR DR. NEEDHAM: On the 15th of this month, at the meeting of our Board of Directors, I recommend for their approval, which is required, the fixing of October 15, 1908, as the date when, if the George Washington University failed to purchase the Dean property, this Company, as Trustee, should deed the Chevy Chase property to the Executor, or Heir of the Estate of Theodore J. Mayer, deceased, in accordance with the terms of the deed in trust, dated February 5, 1907.

The point was raised in the Board, although I stated that it was in harmony with your views as expressed to me verbally, that you should acquiesce, in writing, in fixing this date on behalf of the University.

I wrote to Mr. Mayer, through Mr. Brandenburg, informing him of the fixing of the date, and expressing the hope that it would be satisfactory. Since then, Mr. Mayer has called, and expressed no objection to this course being pursued.

Kindly write me, giving your assent to this date, officially, in time to allow me to bring it before the Board, for its approval.

Very sincerely yours,
(Signed) JOHN JOY EDSON, *President.*

58 DEFENDANT'S EXHIBIT 'E.'

CAZENOVIA, NEW YORK, *Aug.* 12, 1908.

DEAR MR. EDSON: Your letter of the 10th is received. My answer to your former letter was written the same day, 10th inst., and has no doubt been received. Your action fixing October 15th "as the date when, if The George Washington University failed to purchase

the Dean property," your Company, "should deed the Chevy Chase property to the Executor or heir of the estate of Theodore J. Mayer, deceased," &c., &c., seems to me reasonable as in accordance with the views expressed when we met in Washington.

I shall continue to hope that this desirable site may be acquired by the University and that Mr. Mayer's earnest wish expressed to me a few days before his death, that a suitable memorial building be erected thereon to be named after his wife, may be realized.

Very truly yours,

(Signed) CHAS. W. NEEDHAM.

Hon. John Joy Edson, President, &c., &c., &c.

59 DEFENDANT'S EXHIBIT 'F.'

WASHINGTON, D. C., *October* 15, 1908.

Washington Loan & Trust Company, Mr. John Joy Edson, President.

DEAR SIR: In the matter of the Chevy Chase property conveyed in trust to The Washington Loan & Trust Company by the late Theodore J. Mayer, to be turned over to the University upon condition that it acquire the Dean site, I am instructed by the Board of Trustees of the University to inform you that the owners of the Dean property refuse to sell the property to the University, for the reason that they do not wish to dispose of it. For this reason it is impossible for the University to perform the condition named in the trust above referred to.

Very truly yours,

(Signed) CHAS. W. NEEDHAM.

60 DEFENDANT'S EXHIBIT "G."

Statement of Account of the Washington Loan and Trust Company, Trustee, Estate of Theodore J. Mayer.

NOVEMBER 19, 1908.

Chandlee Cottage—Received from Fisher & Co.			38.
" " —Carter	June	14, 1907.....	40.
" " "	July	14.....	40.
" " "	Aug.	14.....	40.
" " "	Sept.	14.....	40.
" " "	Oct.	14.....	40.
" " "	Nov.	14.....	40.
" " "	Dec.	14.....	40.
" " "	Jan.	14, 1908.....	40.
" " "	Feb.	14.....	40.
" " "	M'ch	14.....	40.
" " "	Apr.	14.....	40.
" " "	May	14.....	40.
" " "	June	14.....	40.
" " "	July	14.....	40.
" " "	Aug.	14.....	40.
" " "	Sept.	14.....	40.
" " "	Oct.	14.....	40.
" " "	Nov.	14.....	40.

Laboratory—Gates Apr. 15/07 to		
" " M'ch 15, 1908.....	5000.	
" " Apr. 15, 1908.....	416.66	
" " May 15,.....	416.67	
" " a/c June 15,.....	413.06	
Return premium insurance, Old Colony # 21513	9.77	
Return premium insurance, Georgia Home....	9.77	
Repairs to plumbing (Artz) Chandlee Cottage..	.....	1.25
Insurance, $73,000. 1 year from June 1, 1907..	.....	1178.88
" 73,000. " " from June 1, 1908..	.....	1178.96
Bell & Company—repairs to plastering at Chandlee Cottage	.....	2.50
Galloway—repairs to Time Clock in Laboratory.	.....	2.
Marsden— " " plumbing Chandlee Cottage	.....	3.50
Taxes—1907	.....	284.69
" 1908	.....	287.86
Walker—repairs to furnace Chandlee Cottage..	.....	3.
Carter (Marsden for repairs) repairs to plumbing Chandlee Cottage.....	.....	4.
Stutz repairs to plumbing—Chandlee Cottage..	.....	5.
Carter—repairs to plumbing Chandlee Cottage.	.....	1.50
" " " " " .	.....	2.25
Brandenburg and Brandenburg, professional services *in re* Chevy Chase property.....	.....	1000.
Commission	.....	351.20
Balance	.....	2717.34
	7023.93	7023.93

61 *Answer of The George Washington University.*

Filed December 16, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 28094.

THEODORE ALBERT MAYER, Complainant,
vs.
THE AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased, *et al.*, Defendants.

Now comes the defendant, The George Washington University, and for answer to the bill of complaint in this cause filed, or such parts thereof as it deems necessary and proper for it to answer unto, it answering says:

That for the purpose of this suit, while not having personal knowledge of all the matters and things set forth in the bill of complaint in this cause filed, it admits said allegations thereof to be true.

Further answering said bill of complaint this defendant says that by reason of the impossibility of the performance of the condition attached to the Declaration of Trust executed by Theodore J. Mayer, in his lifetime, wherein and whereby certain property known as the Chevy Chase property was conveyed to The Washington Loan & Trust Company to be held by it in trust for this defendant, it has been unable to perform fully the conditions set forth in said
62 Declaration of Trust. It, therefore, has notified the Trustee, the defendant, The Washington Loan & Trust Company, as alleged in the bill of complaint, that it disclaims any further or other interest in the said Chevy Chase property and the letters patent, also embraced in said Declaration of Trust. This defendant, however, in making this disclaimer does not intend to renounce any other or further rights which it may have as a residuary legatee under the last will and testament of the said Theodore J. Mayer, deceased.

THE GEORGE WASHINGTON UNIVERSITY,
By CHAS. W. NEEDHAM, *President.*

JOHN B. LARNER, *Attorney.*

Charles W. Needham, being first duly sworn deposes and says that he is the President of The George Washington University; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and as to those stated upon information and belief he believes them to be true.

CHAS. W. NEEDHAM.

Subscribed and sworn to before me this 16th day of December 1908.

[SEAL.] JOHN A. PETTY,
Notary Public.

63 DEFENDANT'S EXHIBIT 'H.'

Filed December 22, 1908.

BASS ROCKS, GLOUCESTER, MASS., *July* 23, 1907.

Thomas Bradley, Esq., The Washington Loan & Trust Co., Washington, D. C.

DEAR SIR: Your favor of the 19th instant, forwarded to me here, is received. Answering your questions and also the statements in Mr. Mayer's letter, I beg to say:

In January last Mr. Theodore J. Mayer, since deceased, sent me the proposition in writing, a copy of which is set forth in the letter of The American Security and Trust Company, copy of which you enclose with your letter. This tender by Mr. Mayer was presented

to, and was duly accepted by the Board of Trustees of The George Washington University. The Van Ness property referred to was sold and negotiations entered into for the purchase of the Dean property referred to in Mr. Mayer's letter. This property, known as Oak Lawn, was offered to the University for Six hundred thousand dollars net, upon condition that a building to be erected thereon by the University should be called Dean Hall in memory of the late Mr. & Mrs. Dean. This price was considered by some of the Trustees and the late Mr. Mayer as too much for the property and an effort was made and is still being made to secure the property at a reasonable price. It was also thought prudent, by the Trustees and also by Mr. Mayer, that we secure options upon some
64 adjoining properties before consummating the purchase of Oak Lawn. While these negotiations were pending and to give time to complete them, Mr. Mayer executed the deed conveying the Chevy Chase property to your Company upon the trust expressly set forth in the declaration of trust executed by the Company and vesting in the Company the power to determine what should be a "reasonable time" within which the University must complete the purchase. By this act Mr. Mayer rescinded from the limitation of time fixed in his letter addressed to me of date January twenty-second. To have fixed a date would have given the owners of Oak Lawn a decided advantage in the negotiations as to the price to be paid therefor.

At the April meeting of the Board of Trustees of the University the purchase of Oak Lawn was fully considered and formal action taken, which is of record, authorizing the purchase upon the condition named, at the net price of five hundred and fifty thousand dollars. This was communicated to, and taken under advisement by the owners of the property. Shortly before leaving Washington on my vacation I was verbally informed that the owners would not accept less than the six hundred thousand dollars named in their offer. So many of the members of our Board had then left the city for the summer that a special meeting could not be held and further consideration and action upon the money consideration must go over until the October meeting. These negotiations were in strict accord with the views and advice of the late Mr. Mayer. I visited him twice during his illness after the deed had been executed
65 to your Company and advised with him fully about the matter. He expressed great satisfaction that Van Ness Park had been sold in compliance with his letter, as he was strongly opposed to that location. He was also much gratified with the action of the Board of Trustees in approving Oak Lawn as the site for the University and advised me to secure options upon some other properties, if possible, and to get the property at a reasonable price. Mr. Mayer did not express any dissatisfaction at any time with our efforts or plans nor did he at any time after the sale of Van Ness Park and the execution of the deed to your Company mention any date or time when the purchase of Oak Lawn should be completed, but he did say to me that your Company would deal fairly in carrying out the trust.

Under all the circumstances and in view of the fact that the University has complied with part of the conditions named by Mr. Mayer,—the sale of Van Ness Park and approving of Oak Lawn as the site, and is negotiating for the purchase, it would be unfair to embarrass the matter by naming a short time within which the purchase shall be completed. Such action, if known, would be giving the owners a decided advantage and might result in their raising the price at which the property has been offered.

I submit that no rights are suffering or being endangered by reason of the delay; your Company holds the property and the proceeds thereof for whoever shall finally be entitled to them. One year is always considered a reasonable time within which to settle an estate.

Permit me also to call your attention to relative dates of the Will
66 under which the American Security & Trust Company is acting, the deed to your Company and the declaration of trust, and the fact that by the express terms of the latter the property reverts to the "heir" in case of default on the part of the University, and does not go to the Executor.

In conclusion I beg to express the hope that your Company will exercise its discretion in determining "reasonable time" in the interest of carrying out the generous provision made by Mr. Mayer for higher education and for a memorial to his deceased wife after whom the building provided for is to be named.

With great respect, I am,

Sincerely yours,

(Signed) CHARLES W. NEEDHAM.

67 *Replication.*

Filed December 22, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28094. Equity.

THEODORE J. MAYER
vs.
AMERICAN SECURITY & TRUST CO. ET AL.

The complainant joins issue with the defendants on their answers filed herein.

BRANDENBURG & BRANDENBURG,
Attorneys for Complainant.

Stipulation for Hearing.

Filed December 22, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28094. Equity.

THEODORE J. MAYER
vs.
WASHINGTON LOAN & TRUST CO. ET AL.

The parties complainant and defendant in the above entitled cause hereby agree that the same may be heard upon the bill
68 and answer forthwith without being placed upon the calendar for hearing.

BRANDENBURG & BRANDENBURG,
Attorneys for Complainant.
WM. F. MATTINGLY,
Sol. for Am. Sec. & Trust Co.
JOHN B. LARNER,
Attorney for Defendants, Washington Loan & Trust Co. & George Washington University.

Decree Dismissing Bill.

Filed December 31, 1908.

In the Supreme Court of the District of Columbia.

No. 28094. In Equity.

THEODORE ALBERT MAYER, Complainant,
vs.
AMERICAN SECURITY AND TRUST COMPANY, Executor and Trustee, *et al.*, Defendants.

This cause came on to be heard at the present special term, was argued by counsel for the complainant and the American Security and Trust Company, defendant, and having been duly considered by the Court and it appearing to the Court that the real and personal property and patent rights mentioned and described in the proceedings in this cause, conveyed and assigned to the defendant, the Washington Loan and Trust Company, by Theodore J. Mayer, and held by said Washington Loan and Trust Company upon the
69 trusts set forth in its declaration of trust relative thereto as stated and set out in the VII paragraph of the Bill of Complaint in this cause, passed to said American Security and Trust Company under the residuary clause of the will of said Theodore J. Mayer, and that it is the duty of said Washington Loan and Trust Company to reconvey said real and personal property and patent rights to said American Security and Trust Company in fee simple, to hold upon the trusts and for the purposes set forth in said will:

it is this 31st day of December, A. D. 1908, adjudged, ordered and decreed that the Bill of Complaint in this cause be and the same hereby is dismissed; and that the complainant pay the costs in this cause to be taxed by the Clerk.

JOB BARNARD, *Justice.*

From the above decree the complainant appeals in open court and the penalty of the appeal bond for costs is hereby fixed at $100.

JOB BARNARD, *Justice.*

Memorandum.

January 4, 1909.—Appeal bond filed.

70 *Directions to Clerk for Preparation of Transcript of Record.*

Filed January 4, 1909.

In the Supreme Court of the District of Columbia, the 4th Day of January, 1909.

Equity. No. 28094.

T. A. MAYER
vs.
THE WASH. LOAN & TRUST CO. ET AL.

The Clerk of said Court will please prepare the record on appeal, containing the following: bill and exhibits; answers & exhibits; decree & bond.

BRANDENBURG & BRANDENBURG,
Attorneys for Complainant.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28094, Equity, wherein Theodore Albert Mayer is Complainant and American Security & Trust Company, Executor, &c. *et al.,* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of February, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1987. Theodore Albert Mayer, appellant, *vs.* American Security & Trust Company, executor, &c., *et al.* Court of Appeals, District of Columbia. Filed Feb. 2, 1909. Henry W. Hodges, clerk.

THURSDAY, *April 8th, A. D.* 1909.

No. 1987.

THEODORE ALBERT MAYER, Appellant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased; Washington Loan & Trust Company, Trustee, and George Washington University.

The argument in the above entitled cause was commenced by Mr. E. C. Brandenburg, attorney for the appellant, and was continued by Mr. Wm. F. Mattingly, attorney for the appellees, and was concluded by Mr. E. C. Brandenburg, attorney for the appellant.

No. 1987.

THEODORE ALBERT MAYER, Appellant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased; Washington Loan & Trust Company, Trustee, and George Washington University.

Opinion.

Mr. Justice Robb delivered the opinion of the Court:

This is an appeal from the order of the Supreme Court of the District dismissing appellant's bill of complaint. The cause was heard on bill and answers, and the facts are substantially these:

On or about February 5, 1907, Theodore J. Mayer, since deceased, by deed in fee simple absolute conveyed to the Washington Loan and Trust Company certain real estate situated in Chevy Chase, Montgomery County, Maryland, described in the bill as the Chevy Chase property, and said company executed a declaration in trust which was accepted by the defendant, the George Washington University. This declaration of trust is as follows:

"In trust.

"1. To convey said property, in fee simple, to the said George Washington University, when and at such time as the said University shall acquire a fee simple to the property known as the 'Dean or Oak Lawn Property,' located north of Florida avenue, between 19th street and Connecticut avenue, in the county of Washington, District of Columbia, as a site for its university buildings, and through the action of its board of trustees, shall abandon the idea of retaining the site known as the Van Ness property, now owned by it, as the location of the said University.

"2. That upon the conveyance of the said 'Dean or Oak Lawn Property' to the George Washington University, said University

shall agree in writing, by authority of its board of trustees, to erect upon the said 'Dean or Oak Lawn Property' as a part of its group of university building, a building of stone and brick to be used for educational purposes and to be designated, 'The Susanna Mayer Memorial.'

"3. That said Theodore J. Mayer having given an option to one Elmer Gates for the purchase of said property located at Chevy Chase, hereinbefore described, which option expires on the 15th day of April, 1907, for the sum of one hundred and eighty-five thousand dollars ($185,000), it is understood that in the event of this option being accepted the said The Washington Loan and Trust Company, shall have full power to deed the same to the said Gates, in fee simple, or his assigns, and receive the purchase money or its equivalent and to hold said money in and upon the same trusts as hereinbefore and hereinafter expressed for the property itself.

"4. In the event that The George Washington University shall acquire the 'Dean or Oak Lawn Property' pending the sale or the disposition of the Chevy Chase property, it shall be kept fully insured, in good repair, and the hedges and lawns properly trimmed by the George Washington University.

"5. The intent and purpose of the said Theodore J. Mayer by his conveyance to the Washington Loan and Trust Company is to donate to the George Washington University the land known as the Chevy Chase property hereinbefore more particularly described for the uses and purposes of said University, only upon condition, however, that the said University shall acquire the 'Dean or Oak Lawn Property,' hereinbefore referred to, and shall use the same as the site of the George Washington University, and shall abandon the Van Ness property for this purpose, either by sale or by direct notice action of its board of trustees, and with the proceeds of the sale of the said Chevy Chase land to erect upon the 'Dean or Oak Lawn Property,' a suitable educational building to be a memorial to the deceased wife of the said Mayer and to be designated 'The Susanna Mayer Memorial' as aforesaid. This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said The George Washington University.

"6. And upon this further trust in the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the trustee, when said property, so as aforesaid conveyed to the trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns."

Said Theodore J. Mayer died on the 16th of March, 1907, leaving a will dated February 15, 1907, which contained the following residuary clause:

"All the rest and residue of my estate, real, personal and mixed, which I now possess, or which may hereafter be acquired by me and wheresoever situate, I give, devise, and bequeath unto the American Security and Trust Company, a corporation existing and doing busi-

ness in the District of Columbia under and by virtue of the authority of the laws in force therein, its successors and assigns.

"In trust, however, for the following uses and purposes, . . ."

At the time of the decease of Mr. Mayer the George Washington University had not complied with the conditions of the trust respecting said Chevy Chase property, nor did it subsequently comply with those conditions, and now makes no claim to said property. Said Theodore J. Mayer left surviving him as his sole heir at law his son, the complainant, Theodore Albert Mayer, who instituted this proceeding for the purpose of obtaining possession and control as such heir at law of said Chevy Chase property.

The appellee, the American Security and Trust Company, contends that said property passed to it under the residuary clause of said will along with the bulk of said decedent's estate, to be held by it in trust for the complainant until he reaches the age of 48 years, and then to convey to him in fee.

The appellant contends that testator at the time of the execution of his will and continuously thereafter until the time of his death had no devisable interest in said property, and that, therefore, the same devolved upon appellant as the heir at law. The further contention is made by appellant that, even assuming that the interest of the testator was devisable, such an intent does not appear in the will; further, that, if it be assumed that such intent does appear, apt words were not used.

Considering the deed and declaration of trust together, as we are bound to do, it is very apparent that an estate upon condition was thereby created. Was this a condition precedent or a condition subsequent? If a condition precedent, the vesting of the estate was dependent upon the performance of the condition. If a condition subsequent, the estate vested immediately and the non-performance of the condition rendered it liable to be defeated. There are no technical words to distinguish these conditions, and whether they be the one or the other is a matter of construction and depends upon the intention of the party creating the estate. 4 Kent Comm., Parg. 124. It is first provided in the declaration of trust that "although the said deed purports to convey to said grantee an absolute title to the said property the same is held by the Washington Loan and Trust Company for the use and benefit of the George Washington University of Washington, D. C.," upon certain declared conditions; that is to say, to convey said property in fee simple to said University "when and at such time as said University" shall perform the conditions enumerated. After the enumeration of those conditions the declaration of trust states that "the intent and purpose of the said Theodore J. Mayer by his conveyance to the Washington Loan and Trust Company is to donate to The George Washington University the land known as the Chevy Chase property hereinbefore more particularly described for the uses and purposes of said University, only upon condition, however, that the said University shall" perform each of the conditions hereinbefore enumerated. The declaration of trust further provides that "in the event of the failure of said University

to comply with the terms and conditions of this trust within a reasonable time" said property "is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns." We think it quite apparent from reading this declaration of trust that the trustee acquired nothing more than a mere naked trust or power to dispose of said property in the manner specified and that no estate was to vest in the University until the performance of the conditions named. Any other construction does violence to the language of the trust instrument for it is expressly provided therein that it is the intent and purpose of Mayer to donate said property to the University "only upon condition" that said University shall perform the conditions specified. Those conditions were never performed; hence no estate ever vested in the University. It will be noticed that the donor instead of providing that in such event the property should revert, a term which he might have employed had he been dealing with a condition subsequent, provided that the property should be reconveyed to him, his heirs or assigns. We think the effect of this declaration of trust was to vest in the trustee, as before stated, the bare legal title of the trust estate, and that the equitable ownership remained in the donor. Had the University performed the conditions precedent, the equitable title thereupon would have vested in it and it would have had a right to demand and receive a conveyance in fee simple from the trustee. Rice v. R. R. Co., 1 Black 358.

Counsel for appellant in their exhaustive and interesting brief rely upon Wilson v. Galt, 18 Ill., 430, and Schuenberg v. Harriman, 21 Wall., 44, to support their contention that the condition annexed to this conveyance was a condition subsequent. In the former case this question was not involved for the reason that the court found the condition to have been performed. Neither was it attempted in that case to point out the distinction between conditions subsequent and conditions precedent. In the latter case certain public lands had been granted to the State of Wisconsin to aid in the construction of railroads in that State. Under the act the State possessed power to dispose of not exceeding 120 sections of land in advance of the construction of the road. As to the remainder of the land the State had authority to sell as the building of the road progressed, and it was provided that if the road was not constructed within ten years no further sale should be made, and the lands unsold should revert to the United States. No part of the road was ever constructed and no proceedings were taken to establish a forfeiture of the grant. The court held that the language used by Congress imported a present grant to the State and that the provision for reverter was no more than a provision that the grant should be void if a condition subsequent be not performed. In that case, as is quite apparent, a present interest passed to the State. While the object of the grant was to aid in a public improvement, the State was nevertheless empowered immediately to dispose of 120 sections of the land granted. If at the end of ten years the road was not completed, it was within the power of the United States to repossess itself of the lands unsold. This was a condition subsequent. The facts in that case are quite different from the facts in

the present case. Here, as previously stated, no beneficial interest passed to the trust company. It was vested with the legal title, but that title was so limited and restricted that it amounted to nothing more than a power to convey upon the happening of certain definite specified conditions. If the distinction between precedent and subsequent conditions is to be maintained, and if intent is to govern, we must hold that this was an estate upon condition precedent.

The equitable ownership retained by Mayer was clearly devisable. Maryland Code of 1904, section 314; 4 Kent Comm., 510; Schouler on Wills (3 ed.), Parg. 28; 1 Jarman on Wills, Parg. 48. The cases cited by appellant, to the effect that a mere possibility of reverter or a right to enter for a condition broken, was not devisable under the Maryland Code as it then read, have no application to the facts of this case, for the reasons given. Even such interest may now be devised under section 314 as amended by the act of March 18, 1908. Laws of Md., 1908, p. 264. Even though it should be held that only a contingency or possibility coupled with an interest remained in Mayer, such an estate was devisable. Hamilton v. Darrington, 36 Md., 434; 4 Kent Comm., Parg. 261.

We see no merit in the contention that the intent of the testator to devise this property is not manifest from his will. After making certain specific bequests the testator in a comprehensive residuary clause disposed of the bulk of his estate. We have found that he retained the equitable ownership of that property. He was, therefore, possessed of a present interest, and the residuary clause was sufficient to pass that interest.

The decree is affirmed, with costs.

Affirmed.

TUESDAY, *June 1st, A. D.* 1909.

April Term, 1909.

No. 1987.

THEODORE ALBERT MAYER, Appellant,
vs.
AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased; Washington Loan & Trust Company, Trustee, and George Washington University.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB,
June 1, 1909.

FRIDAY, *June 4th, A. D.* 1909.

No. 1987.

THEODORE ALBERT MAYER, Appellant,

vs.

AMERICAN SECURITY & TRUST COMPANY, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased; Washington Loan & Trust Company, Trustee, and George Washington University.

On motion of Mr. E. C. Brandenburg, of counsel for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

(*Bond on Appeal.*)

Know all men by these presents, That we, Theodore A. Mayer, as principal, and The United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto The American Security & Trust Co., Washington Loan & Trust Co. & George Washington University in the full and just sum of Three hundred dollars, to be paid to the said The American Security & Trust Co., Washington Loan & Trust Co., and George Washington University — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Theodore Albert Mayer vs. The American Security & Trust Co., Washington Loan & Trust Co., & George Washington University a decree was rendered against the said Theodore Albert Mayer and the said Theodore Albert Mayer having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said The American Security & Trust Co., Washington Loan & Trust Co., and George Washington University citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Theodore Albert Mayer shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

THEODORE A. MAYER. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY CO., [SEAL.]
By GEORGE O'DONNELL, [SEAL.]
Attorney in Fact.

[Seal of The United States Fidelity and Guaranty Company.]

Sealed and delivered in presence of—
E. C. BRANDENBURG.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1987. Theodore Albert Mayer, Appellant, vs. American Security & Trust Company, Executor, &c., et al. Bond on Appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 7, 1909. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To American Security & Trust Company, Executor and Trustee under the Last Will and Testament of Theodore J. Mayer, Deceased; Washington Loan & Trust Company, Trustee, and George Washington University, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Theodore Albert Mayer is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 7th day of June, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 7th day of June, A. D. 1909.
JOHN B. LARNER,
Att'y, Washington Loan & Trust Co.
WM. F. MATTINGLY, *Att'y.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 7, 1909. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 44 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Theodore Albert Mayer, Appellant, vs. American Security & Trust Company, Executor and Trustee under the last will and testament of Theodore J. Mayer, deceased, Washington Loan & Trust Company, trustee, and George Washington University, No. 1987, April Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of April, A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Endorsed on cover: File No. 21,736. District of Columbia Court of Appeals. Term No. 77. Theodore Albert Mayer, appellant, vs. American Security & Trust Company, executor and trustee under the last will and testament of Theodore J. Mayer, deceased, et al. Filed June 25th, 1909. File No. 21, 736.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 77.

THEODORE ALBERT MAYER, *Appellant*,

v.

AMERICAN SECURITY & TRUST COMPANY, *Executor and Trustee, et al.*

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT.

STATEMENT OF FACTS.

The question involved in this case is as to the right of the appellant to the immediate possession and control of the property described in the bill of complaint as the Chevy Chase property, as well as certain personal property and patents of a scientific nature.

On February 5, 1907, Theodore J. Mayer, since deceased, by deed conveyed certain real estate in Chevy Chase, Montgomery County, Maryland, near the District of Columbia line, to the Washington Loan & Trust Company in fee

simple (R., p. 15), the said property being improved by various buildings. At the same time there was likewise conveyed to the said Trust Company, certain valuable machinery and plant together with the furniture then upon the said property; also various letters patent of which 72 were American, 7 English, 4 Canadian, and 1 New Zealand (R., pp. 23-27).

Subsequent to the execution of this conveyance or about the same time, the said Trust Company, Mayer and the George Washington University united in an agreement, without date, with reference to said property, which is as follows, to wit:

> "Whereas, Theodore J. Mayer, of the City of Washington, D. C., did, on the 5th day of February, 1907, execute a certain deed in fee simple to property known as all of Block numbered twenty-seven (27) in Section numbered two (2) of a Subdivision made by the Chevy Chase Land Company of Montgomery County, Maryland, being as per plat recorded in Liber J. A. No. 36 at folio 61, of the Land Records of Montgomery County, Maryland, together with the improvements thereon, machinery plant and furniture thereon, to the Washington Loan & Trust Company of Washington, D. C., and although the said deed purports to convey to said grantee an absolute title to the said property the same *is held by the Washington Loan & Trust Company for the use and benefit of the George Washington University of Washington, D. C.*, in and upon certain trusts which are hereby declared to be as follows, that is to say:
>
> "IN TRUST.
>
> "1. To convey said property, in fee simple, to the said George Washington University, when and at such time as the said University shall acquire a fee simple to the property known as the 'Dean or Oak Lawn Property,' located north of Florida Avenue, between

19th Street and Connecticut Avenue, in the County of Washington, District of Columbia, as a site for its University Buildings, and through the action of its Board of Trustees, shall abandon the idea of retaining the site known as the Van Ness property, now owned by it, as the location of the said University.

"2. That upon the conveyance of the said 'Dean or Oak Lawn Property' to the George Washington University, said University shall agree in writing, by authority of its Board of Trustees, to erect upon the said 'Dean or Oak Lawn Property,' as a part of its group of University Buildings, a building of stone and brick to be used for educational purposes and to be designated, 'The Susanna Mayer Memorial.'

"3. That said Theodore J. Mayer having given an option to one Elmer Gates for the purchase of said property located at Chevy Chase, hereinbefore described, which option expires on the 15th day of April, 1907, for the sum of One Hundred and Eighty-five Thousand Dollars ($185,000), it is understood that in the event of this option being accepted the said The Washington Loan & Trust Company, shall have full power to deed the same to the said Gates, in fee simple, or his assigns, and receive the purchase money or its equivalent and to hold said money in and upon the same trusts as hereinbefore and hereinafter expressed for the property itself.

"4. In the event that The George Washington University shall acquire the 'Dean or Oak Lawn Property,' pending the sale or the disposition of the Chevy Chase property, it shall be kept fully insured, in good repair and the hedges and lawns properly trimmed by the George Washington University.

"5. The intent and purpose of the said Theodore J. Mayer by his conveyance to The Washington Loan & Trust Company is to donate to the George Washington University the land known as the Chevy Chase property hereinbefore more particularly described for the uses and purposes of said University, only upon condition, however, that the said University shall ac-

quire the 'Dean or Oak Lawn Property,' hereinbefore referred to, and shall use the same as the site of the George Washington University, and shall abandon the Van Ness property for this purpose, either by sale or direct notice action of its Board of Trustees, and with the proceeds of the sale of the said Chevy Chase land to erect upon the 'Dean or Oak Lawn Property,' a suitable educational building to be a memorial to the deceased wife of the said Mayer and to be designated 'The Susanna Mayer Memorial,' as aforesaid. This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said The George Washington University.

"6. And upon this further trust in the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the Trustee, when said property, so as aforesaid conveyed to the Trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns.

"In evidence of the acceptance of this trust by the George Washington University, it has caused this instrument to be signed by its President, attested by its Secretary, and its corporate seal hereto affixed.

"And, the said Theodore J. Mayer in approval of the terms of the trusts herein expressed has also signed this instrument and affixed his seal hereto.

"In testimony whereof, The Washington Loan & Trust Company has caused these presents to be signed by its President, attested by its Treasurer, and its corporate seal to be hereto affixed."

Ten days after the execution of this deed, to wit, on February 15, 1907, Mr. Mayer executed his last will and testament in which he makes no reference to this particular property (R., p. 10). He died on March 16, 1907, possessed of other real estate and personal property of great

value (R., p. 2). From the pleadings it appears that irrespective of the property, real and personal, conveyed to the Trust Company, the remaining assets and estate were amply sufficient to satisfy in full all the legacies directed to be paid by the provisions of his will.

By the terms of the will, after making various bequests and devises, the testator, by the twenty-first paragraph thereof, made the following provision:

> "All the rest and residue of my estate, real, personal and mixed, which *I now possess,* or which may hereafter be acquired by me and wheresoever situate, I give, devise and bequeath unto the American Security & Trust Company * * * in trust," etc. (R., p. 12).

Prior to the death of Mr. Mayer the University complied with part of the condition named in the agreement, pursuant to which the property was held by the Trust Company, to wit, by the sale of Van Ness Park and approved of Oak Lawn, known as the Dean property, as the future site of the University.

Nearly a year subsequent to the death of Mr. Mayer correspondence took place between Theodore Albert Mayer, testator's son and sole heir, and the Washington Loan & Trust Company, who then and now hold the property under the aforesaid deed, and the George Washington University, with reference to the default of the latter to acquire the Dean property, which acquisition was necessary to entitle it to a deed of conveyance thereof from the said Trust Company. As a result of this correspondence, the Washington Loan & Trust Company fixed the time for the performance of the condition upon which the title of the Chevy Chase property was to be conveyed to the University, pursuant to the power contained in the aforesaid agreement, as October 15, 1908 (R., p. 29).

Under date of October 15, 1908, the University advised the Washington Loan & Trust Company that it was impossible to acquire the Dean property, and that therefore it could not perform the condition under which it was to receive title (R., p. 30). Accordingly, the default of the University which warranted a reconveyance to "Theodore J. Mayer, his heirs or assigns," under the terms of the aforesaid agreement, did not arise during his lifetime, but 19 months subsequent to his death.

It further appears from the pleadings that subsequent to the decision of the University, the appellant requested the Washington Loan & Trust Company to convey the said Chevy Chase property, machinery and patents to him as the son and sole heir at law of the said Theodore J. Mayer, but owing to a like demand of the American Security & Trust Company, trustee under the will of his father, the said Theodore J. Mayer, it declined to assume the responsibility of passing upon the conflicting claims thus made, whereupon the appellant filed his bill in the Supreme Court of the District, praying that he be decreed to be the owner of the said property, which case was heard upon bill and answer.

Upon hearing in the trial court, the bill was ordered dismissed, and upon appeal to the Court of Appeals of the District of Columbia, the decree of the trial court was affirmed and the case is here on appeal by the original complainant from the decree of the Court of Appeals of the District of Columbia.

ASSIGNMENTS OF ERROR.

The court below erred:

1st. In affirming the decree of the trial court, dismissing the bill.

2d. In declining to reverse the decree of the trial court and in declining to remand the cause with directions to

the trial court to enter a decree adjudging that the Chevy Chase property should be conveyed to the appellant.

3d. In holding that the interest of said Theodore J. Mayer after said conveyance by him was an equitable ownership.

4th. In holding that the condition set forth in the declaration of trust was a condition precedent.

5th. In holding that the interest of Theodore J. Mayer in the Chevy Chase property together with the personal property thereon and patents prior to the determination of the George Washington University not to purchase the Dean property was of such a character as would pass under his will.

6th. In holding that the title to the property involved in the bill of complaint passed under the will of Theodore J. Mayer to the American Security & Trust Company as trustee.

ARGUMENT.

The proper determination of the question whether, on failure of the University to perform the condition of the agreement which entitled it to a conveyance, the property should be reconveyed to the son and sole heir of Theodore J. Mayer, who is the appellant, or to the American Security & Trust Company, the trustee under his will, necessarily involves on this appeal the determination of four propositions, namely:

First: What was the nature of the interest remaining in Mr. Mayer, if any, after the execution of the deed in fee to the Washington Loan & Trust Company, before failure of the University to perform the condition.

Second: Whether said interest could be devised.

Third: If so, whether the intention of the testator to actually devise the same can be gathered from the will

itself in the light of the circumstances attending its execution; and,

Fourth: Assuming such intention exists, whether apt words have been used to devise the same.

It is claimed on behalf of the appellant, the American Security & Trust Company, that the Chevy Chase property, contents and patents passed to it under the residuary clause of the will, and is to be held by it for the appellant until he attains the age of 48 years, at which time it is to be conveyed to him in fee.

On the other hand, the appellant claims that the testator at the time of the execution of his will and continuously thereafter, until the time of his death, had no devisable interest in the said property, and that the same devolved upon the appellant, as the testator's son and sole heir; and further that even if the interests of the testator were devisable, his intention to devise the same does not appear in the will, either by express language or by necessary inference.

It should be remembered that, as shown by the record in this case, the bulk of the estate which is held in trust for the appellant by the American Security & Trust Company as trustee, until he reaches the age of 48 years, is not now involved. It should also be noted that subsequent to the conveyance by Mr. Mayer to the Washington Loan & Trust Company, and prior to his death, the University partially complied with the terms pursuant to which it was to receive said property, by selling the Van Ness property and selecting the Dean property known as Oak Lawn, as the site of the University (R., pp. 33-34). That although the University partially complied with the requirements of Mr. Mayer, it failed to acquire the Dean property during his lifetime, and the Washington Loan & Trust Company, pursuant to the power contained in the

collateral agreement, thereafter fixed the time for the full performance of the condition upon which the title to the Chevy Chase property was to be conveyed to the University as October 15, 1908 (R., p. 29), so that the right to a reconveyance to him, "his heirs or assigns," under the terms of the collateral agreement did not arise during his lifetime, but nineteen months thereafter.

By the terms of the will the appellant is to receive the entire estate of the testator, including the Chevy Chase property (if it passed under the will), upon attaining the age of 48 years, and the effect of the grant of the relief prayed for by the appellant is merely to give him the immediate possession of this particular property, including the patent rights, instead of deferring his right to possession and enjoyment until he attains the age stated (R., p. 12).

THE NATURE OF THE INTEREST REMAINING IN GRANTOR.

On behalf of the appellant it is contended that the conveyance by Mr. Mayer in fee to the Washington Loan & Trust Company and the collateral agreement referred to, was a grant upon condition subsequent; that until forfeited, Mr. Mayer had merely a possibility of reverter or reconveyance.

In considering the questions involved in this case, we assume the laws of Maryland, the situs of the property, will control.

The deed to the Washington Loan & Trust Company was an absolute deed, conveying every vestige of title and interest of the grantor, without any reservation or condition of any character. The deed carried with it the right of possession and this right of possession was exercised by the trustee through a tenant from whom it collected rents, which it still retains as appears by its answer, and

which were to be turned over to the University with the property upon the condition hereinbefore set forth. The collateral agreement expressly provides that the grantee not shall hold the property, but that the property *"is held* by the Washington Loan & Trust Company for the use and benefit of the George Washington University."

In this case we are not required to determine the nature of the estate or interest acquired by the University under the deed and collateral agreement. We are concerned with determining *the nature of the estate or interest remaining in Mayer* after he made the conveyance to the Washington Loan & Trust Company. Had the conveyance been made direct to the University there could be no question but that the provision for the acquisition of the Dean property created a condition subsequent. The result is no different so far as Mayer is concerned because he conveyed the property to a third person. The conveyance was of the fee and he was to be entitled to a reconveyance only in case the University failed to acquire the Dean property and in that event, his interest was not to revest pursuant to any limitation contained in the grant, but pursuant to an express collateral agreement for a reconveyance which, in legal effect, is the equivalent of a reservation of the right of re-entry, as will hereafter appear. Until breach of condition and re-entry or until the exercise of its legal equivalent, the reconveyance of the property, the grantor had nothing more than a *possibility of reverter* or reconveyance, as stated in the leading authorities, if indeed in this instance he had that much. The test whether the transaction, so far as Mayer is concerned, created a condition subsequent is dependent upon and controlled by the fact that he parted with the title to his property. The passing of the title determines whether the condition under which the title is to revert is a condition precedent or sub-

sequent. The passing of the title *from* Mayer was not dependent upon the performance of the condition by the University. The title had already actually passed by his deed in fee to the Trust Company, and so far as his interest is concerned, after the conveyance, it was exactly the same as if he had conveyed the property to the University upon condition that it should revert or be reconveyed upon failure to acquire the Dean property within a reasonable time, or if acquired had failed to erect the memorial.

When a man makes a grant and parts with every vestige of his title and his right to reconveyance arises only on failure of a subsequent event, it is a grant upon a condition subsequent. The test, as laid down in the books, for determining the nature of the interest remaining in the grantor and the nature of the interest conveyed is, whether by the conveyance, and at the time of the conveyance, the grantor parted with his title. If he did, then the happening of the event which would entitle him to a reconveyance, is a condition subsequent.

> "If land is conveyed upon a condition precedent the title will not pass until the performance of the condition. But if the condition is subsequent, the title passes at the time at which the deed is executed and delivered."
>
> Devlin on Deeds, Sec. 958.

Negatively stated, if the title is not passed, the condition is precedent, but if the title does pass at the time the deed is executed, the condition is subsequent.

In Hayden vs. Inhabitants of Stoughton, 5 Pick., 528, the court held that the grant was a condition subsequent because "the fee did not rest in abeyance until the school house should be built but was to be forfeited if it should not be built in a reasonable time."

If the grant had been made to the University by the conveyance of all the rights of the grantor with a provision that if it failed to acquire title to the Dean property within a reasonable time there should be a reconveyance, it would be a condition subsequent *so far as Theodore J. Mayer was concerned,* although the acquiring of the Dean property must have *preceded* the vesting of the absolute fee in the University the test being as above indicated, whether the title passed from Mayer.

The testator interposed the Washington Loan & Trust Company to act for the University and instead of reserving the right of making a formal re-entry himself for breach of condition subsequent, as would have been the case if the conveyance had been direct to the University, he authorizes the Trust Company to take the steps necessary to revest him with his former estate, to wit, by the reconveyance of the property.

The case of Wilson vs. Galt, 18 Ill., 430, is in legal effect the same as the case under consideration. It appears in that case that Wilson, being desirous to secure the prompt completion by a certain date of a dam across a river, conveyed certain land in fee to one John Galt in trust, first, in case a certain Hydraulic Company should build a dam on or before a certain date then to convey the property to that Company in fee, but in case the Company failed to build the dam within that period "then the conveyance should be null and void."

In that case the provision for defeasance was contained in the grant itself. In construing this deed, the Supreme Court of Illinois said:

> "The condition annexed to the deed of trust from complainants to John Galt, the trustee, seems to have a two-fold object: first, as a condition precedent, its performance was necessary to raise the power and

duty in Galt, the trustee, to convey the premises to defendants; and second, as *a condition subsequent,* to defeat or destroy the estate in fee conveyed to Galt in trust and to revest it thereupon in the grantors. * * * There is no doubt, uncertainty or ambiguity in this deed. The intention and the meaning are alike clearly expressed. The fee passed to Galt as a trustee. *It was subject to a condition subsequent* by the non-performance of which the estate in Galt is destroyed and revests in the grantors."

This case is even stronger, however, because instead of having the title revest, upon non-performance of the condition subsequent, as in the Galt case, the collateral agreement expressly provides that before title should revest in Mayer there must be a formal reconveyance.

If any doubt could remain, notwithstanding what has been stated, that the grant was a condition subsequent, so far as Mr. Mayer is concerned, it would seem to be completely set at rest by the decision of this court in Schulenberg vs. Harriman, 88 U. S., 44 (21 Wall.).

Congress granted certain lands to the State of Wisconsin to aid in the construction of railroads. The grant provided that the lands should be subject to the disposal of the Legislature and enacted that if the road should not be completed in ten years, no further sale should be made and the unsold land should revert to the United States. The State accepted the grant and assumed the execution of the trust. The road was never constructed. Congress did not pass any Act nor were any judicial proceedings taken to declare a forfeiture of the grants. The court held that the Acts were grants *in praesenti* and passed the title and when the route was fixed the title, which was previously imperfect, became attached to the land. The court held the provision that the unsold lands after ten years should revert, is a condition subsequent,

being in effect, a provision that the grant should be void if the work designated was not done within that period. In the opinion the court said:

> "That the Act of Congress of June 3, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, 'That there be, and is hereby granted to the State of Wisconsin,' the lands specified. The 3d section declares 'That the said lands hereby granted to said State shall be subject to the disposal of the Legislature thereof;' and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years 'No further sales shall be made, and the lands unsold shall revert to the United States.' The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made; that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed, their location became certain and the title, which was previously imperfect, acquired precision and became attached to the land. * * *(P. 60).
>
> "Numerous other decisions might be cited to the same purport. The[y] establish the conclusion that, unless there are oth[er] clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. * * * (P. 62.)
>
> "The provision in the Act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then

completed, is no more than a provision that the grant shall be void *if a condition subsequent* be not performed. In Shephard's Touchstone it is said: 'If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffer, etc., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffer, shall recipere the land, these are, either of them, good words in a condition to give a re-entry —as good as the word "re-enter"—and by these words the estate will be made conditional.' The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant, and the manner of sale prescribed in the Act." (P. 63.)

In the case just referred to, it is apparent the State had no beneficial interest in the property and in that respect it occupied the same position as that of the Washington Loan & Trust Company in this case. The State merely held the land in trust for the Railroad Company, when the road should be constructed. The Railroad occupied the same position, in that case, that the University occupies in this. There, the Railroad Company acquired no title except upon the completion of the Railroad within the time stipulated. Here the University acquired none until the purchase of the Dean property. This court held because the grant to the trustee, the State, was a grant *in praesenti* of the fee, that the condition, *so far as the United States is concerned,* was a condition subsequent although the construction of the Railroad was, as to the Railroad, *a condition precedent* to the vesting of the title in it; that is to say, while it was a condition precedent as to the railroad, it was a condition subsequent as to the Government. That

case is in all respects like the case at bar and would seem to remove all doubt upon the question that in this case, so far as Mr. Mayer is concerned, the grant was a grant upon condition subsequent.

In the case of Spokane & British Columbia Ry. Co. v. The Washington & Great Northern Ry. Co., decided by this court on January 3, 1911, the case of Schulenberg v. Harriman, *supra,* is referred to with approval, and holds in substance that where the title has passed the grant is upon a condition subsequent and advantage in case of breach, can be availed of only by the grantor or his heirs, or the successors of the grantor if the grant proceeded from an artificial person.

In the case at bar the legal title passed absolutely from Mayer to the Washington Loan & Trust Company, and they held it subject to a condition subsequent. In the case of Finlay v. King's Lessee, 3 Pet., 346, 374, the testator devised certain property to his wife for life and "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife to William King, a son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel, his wife." The court held that so far as the real estate is concerned, including that which is devised to the wife for life, that "the whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for her life, is postponed till her death. The whole will bears marks of being written by a man whose language was far from being accurate, and whose words, if taken literally, would in some instances defeat his intention. That intention, we think, was to devise his whole real estate to William King, in trust, *on a condition subsequent,* postponing the possession of that part of it, which was given to the wife and others for her life, till her death."

A POSSIBILITY OF REVERTER IS NOT AN INTEREST OR ESTATE IN LAND THAT CAN BE DEVISED OR ASSIGNED.

What has been stated determines, we believe, that the grant made by Mayer was a grant upon condition subsequent. The University having sold the Van Ness property and determined upon the Dean site as required by the agreement, during Mayer's life time, and no default having occurred in his life time, and in fact not until 19 months after his death, the interest remaining in Mayer at the time of making his will or at his death was a mere possibility of reverter or reconveyance and was not a devisable interest.

The rule that a right of re-entry or mere possibility of reverter, upon breach of a condition subsequent, was not assignable by deed or devisable by will at common law, is certainly free from doubt. This law against maintenance needs no citation of authority, has always been part of the law of Maryland and of the District of Columbia and has never been changed.

In some States where the common law rule against maintenance seems to be in force and in others, where it is not in force, as in New Jersey, it is held that *after* forfeiture for failure to perform a condition subsequent, an interest arises in the grantor which may be assigned or devised, but it is confidently submitted that the rulings of courts, where the matter has arisen for decision, in all the States where the common law rule is still in force, are practically unanimous in prohibiting a conveyance or devise of such a possibility *before* forfeiture for failure to perform a condition subsequent.

A few of the leading and best considered cases on the subject will be referred to.

In Vail v. Long Island Railroad Company, 106 N. Y., 287, in construing a deed granting the way to the Railroad Company, the court said:

> "When a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor. The deed expressly conveys all the estate, title and interest of the grantors in the premises conveyed. The consideration is not nominal. The covenants of seisen or warranty run to the grantee, 'his (its) heirs and assigns forever.' There are no words limiting the estate conveyed, or which rebut the statutory presumption that the grantors intended to convey all their estate in the land. (1 R. S., 748, Sec. 1.) The *possibility of reverter merely, is not an estate in land, and until the contingency happens the whole title is in the grantee.* (Craig v. Wells, 11 N. Y., 315; Nicoll v. N. Y. & E. R. R. Co., 12 *id.*, 121; 4 Kent Com., 370; Kenney v. Wallace, 24 Hun., 478)."

In Towle v. Remsen, 70 N. Y., 309, in dealing with the question of the right to convey a mere right to reenter, the Court said:

> "The grant most manifestly conveyed a present estate in fee simple which was liable to be defeated by a subsequent event, but which until that event occurred was vested in the grantees. The grantors evidently intended to pass, and did actually convey a title *which was effective, until something transpired to disturb it.* * * *
>
> "No precise technical words are required to constitute a condition precedent or subsequent, and the construction, if such a condition must always be founded upon the intention of the parties. (3 Cruise Digest, 448, title 32, Chap. 24, Sec. 7, *id.*, title 13, Chap. 1, Sec. 10; Blacksmith v. Fellows, 3 Seld, 401; Underhill v. Sargent & Washington R. R. Co., 20

Barb., 455; Spaulding v. Hallenbeck, 39 *id.*, 79, 87.) Even when the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if the act may as well be done afterwards as before the vesting of the estate, the condition is subsequent. (Martin v. Ballou, 13 Barb., 133.) * * *

"If the condition was a condition subsequent then it can only be taken advantage of by a re-entry by the grantors. And upon its determination the interest of the grantor and his representatives becomes a mere possibility of a reversion, incapable of being assigned. (Nicoll v. N. Y. & E. R. R. Co., 12 N. Y., 121.) A right of re-entry for a breach of a condition subsequent does not pass by a conveyance of the lands, and until there is a re-entry by the grantor or his heirs, or the successors of the grantor for a breach of the condition. The estate is not forfeited, but remains unimpaired in the grantee. A mere stranger cannot take advantage of it."

De Peyster v. Michael, 6 N. Y., 506, is a carefully considered case in which the history of the law concerning tenures is fully reviewed by Chief Justice Ruggles, who takes substantially the same position as in the preceding case.

In Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y., 131, there was a grant to the defendant of a tract of land upon condition that the defendant should construct a railroad within a limited time. After the grant but before breach, the interest remaining in the grantor was conveyed to the plaintiff who sued the defendant to recover the possession of the premises for breach of the condition. In the opinion of Parker, Justice, page 131, it is said:

"A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and

until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate.

* * * * * * * * * *

"But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is *no estate* remaining in the grantor. There is simply a *possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone.* It has been said such possibilities were assignable in equity; but those were interests of a very different character, as I will presently show. So far from including these, Kent says (4 Kent's Com., 130): 'A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent,' and the chancellor acted upon that rule in Livingston v. Stickles. (8 Paige, 398.) * * *

"By the Revised Statutes (1 R. S., 725, Sec. 35), expectant estates are descendable, devisable and alienable, in the same manner as estates in possession; and it is claimed that Dederer had an expectant estate." * * *

In defining expectant estates, Justice Parker continues:

"Though as Chancellor Walworth said (in 7 Paige, 76): 'They include every *present right and interest,* either vested or contingent, which may by possibility vest at a future day,' yet *they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living.* The provision of the Revised Statutes, by which expectant estates are made alienable, no doubt covers the same class of interests which, before, were only assignable in equity. They are now assignable at law as well as in equity.

"Kent says (4 Com., 370), that the grantor of an

estate upon condition has only a possibility of reverter and no reversion; and in the note to page 11 of the same volume he says, 'there is only the possibility of reverter left in the grantor and not an actual estate,' citing Martin v. Strachan,' 5 Term R., 107 (note). For examples illustrating the distinction between a naked possibility and a possibility coupled with an interest, see 4 Kent Com., 262, note b, and Jackson v. Waldron (13 Wendall, 178), and Fortescue v. Satterthwrite, 1 Iredell N. C. R., 570.

"Suppose A sells to a banking corporation in fee, by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it until the expiration of its charter, it will revert to him, or, if he be dead, to his heirs. Now, what estate had A after he had conveyed in fee to the bank? None whatever. He had only a possibility of a reverter—a naked and very remote possibility, but nothing that he could convey to an assignee."

In the opinion of Gardiner, C. J., concurring, it is said:

"At the time of this conveyance, Dederer had the mere right to reclaim the premises for the non-performance of the condition. That such a right was not the subject of conveyance at the common law, is fully established by the authorities referred to by the Supreme Court, and those quoted by Judge Ruggles in the case of De Peyster v. Michael, 2 Selden, 506, 507. But it is urged that the court below overlooked a provision of the Revised Statutes defining estates in expectancy, and declaring them 'descendible, devisable and alienable, in the same manner as estates in possession.' (1 R. S., 726, Sec. 35.) A future estate is defined to be an estate limited to commence in possession at a future day, and a reversion to be the residue of an estate left in the grantor or his heirs, commencing in possession on the determination of a particular estate granted. (Secs. 10, 12.) The

right of Dederer was not a reversion, for he had parted with the fee. No remainder could have been limited upon a conditional fee by the common law, for the very conclusive reason that the first grantee took the whole estate, and there was nothing that was the subject of limitation. * * * Accordingly, in De Peyster v. Michael, above referred to, we hold that the right of re-entry, for the non-payment of rent or the non-performance of other covenants, is not such an interest in the estate as would uphold the condition in that case; that it was not a reversion nor the possibility of a reversion, nor any estate in the land. It was a mere right in action, and if enforced, the grantor would be in by forfeiture of a condition and not by a reverter." (*Id.* 506.)

In Locke v. Hale, 165 Mass., 20, it appeared that a parcel of land was granted upon a condition, with reversion to the grantor, his heirs and assigns, in case of breach. An assignee before breach sought to recover the land conveyed, basing his right upon the word "assigns" in the reversion. The Supreme Court held:

"The defendant has placed some stress on the use of the word 'assigns,' in the provision creating the encumbrance. The right of entry for *breach of a condition subsequent is not assignable,* and if the provision is to be regarded as creating a condition subsequent the word was inapt. Hopkins v. Smith, 162 Mass., 444. We think that, if it is not to be rejected altogether, it is to be regarded as inserted rather to show that the condition or restriction was a continuing one, than with a purpose to establish an easement or servitude in favor of the premises occupied by Johnson as a residence."

In Bouvier v. Baltimore, N. Y. R. R. Co., 67 N. J. Law, 281, a grant was made to the railroad company, subject to

a condition, with proviso of re-entry by the grantor, his heirs or assigns. *After* breach an assignment was made and the assignee sought to recover. The court notes the distinction between an assignment before breach and assignment after breach and distinctly holds that an assignment before breach cannot be made and likewise an assignment after breach cannot be made, in the absence of any legislation in a jurisdiction where the English Statutes against maintenance are in force, but held that such statute was not in force in New Jersey. In reviewing the entire subject the court, after referring to what Littleton had written and Coke's comment thereon, said:

> "To the same effect is the declaration in Bacon's Abridgement, the foundation of which work is generally attributed to Chief Baron Gilbert:
>
> > " 'A possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, cannot be granted or assigned over by law; for, if this were permitted, it would promote maintenance and prove prejudicial to such as, being able to contend with those with whom the original contract was, might find themselves depressed by a powerful adversary.' Tit. "Assignment" A, and substantially the same statement tit. "Grants" D. Mr. Hargrave, in note 212 on Coke's Littleton, expresses the same view.
>
> "It is needless to quote other writers or judges. All who give a reason for the doctrine ascribe it to the judicial desire to prevent maintenance.
>
> "A distinction not always clearly made should, however, be borne in mind. Before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter. 4 Kent, Com. 11 n, Nicoll v. New York & Erie Railroad Co., 12 N. Y., 121. After breach there is a vested right.

* * * * * * * * * *

"In most of the States of the Union it has been assumed that the English doctrine of non-transferability of rights of entry for condition broken is the law; and so it well may be as to *attempted transfers before breach;* but after breach it would seem that the test must be the existence or non-existence of the English law as to maintenance. * * * In the case in hand it will be noticed that the right of entry for breach of condition was reserved to the assigns, but I do not regard that as essential. I think that in any case, *wherever the English law against maintenance is not in force, a right of entry for condition broken should be held transferable after breach of the condition. Before breach I think transfer, to be legal, must be authorized by legislation.*

* * * * * * * * * *

"In Schomp v. Schenck, 11 Vroom 195, 204, it was rightly held, in the Supreme Court, that the English law against maintenance is not in force in New Jersey. The Opinion of Chief Justice Beasley, in that case, makes this very clear."

In Helms v. Helms, 137 N. C., 206, land was conveyed by deed in consideration of the support of the grantor for life by the grantee, and if the latter failed to support the grantor, the deed should be void. It was claimed that the doctrine that none but the grantor can take advantage of the breach of the condition is no longer the law. After citing with approval Rush v. Rock Island, and Nicoll v. Railroad, *supra,* the court said:

"But where a fee simple without a reservation of rents is granted upon a condition subsequent, as in this case, *there is no estate remaining in the grantor.* There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. * * *

"While it is true that contingent interests and choses

in action are assignable in equity, and under our code actions may be brought in the name of the assignee *we find no case holding that a bare possibility of reverter comes within this principle.*"

To the same effect are:

Ohio Iron Company v. Auburn Iron Company, 64 Minn., 407.
Warner v. Bennett, 31 Conn., 469.
Higbee v. Rodeman, 129 Ind., 247.
Berenbroick v. St. Luke's Hospital, 23 App. Div. N. Y., 339.

In Tiedeman on Real Property, Sec. 277, the author says:

"As a general rule, therefore, only the grantor and his heirs have a right of entry upon condition broken; they lose their right if they should convey away the reversion in them. The right of entry is not an estate, *not even a possibility of reverter,* it is simply a chose in action."

The word italicized were by the author.

In Sexton v. Chicago Storage Co., 129 Ill., 331, the subject was also dealt with. While the case related to a leasehold interest, nevertheless the decision of the court applies to the matter in issue here.

"The right to enter for breach of condition subsequent could not be alienated, as it could have been had it been an *estate,* and Coke says: 'The reason hereof is for avoiding of maintenance, suppression of right and stirring up of suits, and therefore nothing in action entrie or re-entrie can be granted over.' See, also, 1 Comyn's Digest, title 'Assignment,' Chap. 2, p. 688; 3 *Id.* title 'Condition' (O. 1), p. 129; 4 Kent's Com. (8th Ed.), 126; 1 Preston on Estates, 20; Shepherd's Touchstone, 117.

> "It is said in 1 Washburn on Real Prop. (2d Ed.), 474: 'Such a right' (*i. e.*, to enter for breach of condition subsequent) 'is not a reversion, *nor is it an estate in land.* It is a mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition, *and not by the reverter.*'"

In Denver & S. F. Railway Company v. School District No. 22, 14 Colo., 327, a grant was made to the school district of certain land subject to the agreement that when no longer used for such purpose the land should revert to the grantor, his heirs or assigns. After the use of the land had been discontinued various conveyances were made whereby the original grantor undertook to transfer his interest, if any, remaining in the land. In determining the legal effect of the conveyance and the rights acquired by the grantees of the original grantor, the court said:

> "As Magnus had conveyed his entire estate, it is clear that nothing remained to him which he could convey to Peabody, unless the limitation was such as to leave him vested with an estate in reversion which could be the subject of grant. Such reversion could not exist, however, unless, from the nature of the limitation it appears that the event upon which it was based, in the nature of things, *must happen.* That event was the abandonment of the use of the premises for school purposes. It is manifest that such an event might never occur. The premises might always be used for the purpose for which they were conveyed. This being true, Magnus was not vested with a reversion, or an estate in reversion, and there was nothing left to him save the mere *'possibility of a reverter.'* No interest in the estate, therefore, could pass by his deed to Peabody, and, as a matter of course, as Peabody took nothing he could convey nothing, either to McGavock or the appellant."

There is an elaborate note in 60 L. R. A., page 762, reviewing all the authorities upon the subject under consideration. In his summary the Annotator says:

> "Before breach (this right of entry) is regarded as a mere possibility coupled *with no interest in the land*, and, therefore, no more transferable by the act of the grantor than the possibility that he to whom he has conveyed an estate may voluntarily reconvey. The death of the grantor, however, does not extinguish the possibility and the right to take advantage of it *passes to his heir.*"

In Church v. Elliott, 65 S. C., 251, certain real estate was conveyed by J. to the First Church, which through its trustees covenanted in the deed that it should be used for religious purposes only and that it would erect a building thereon, and that upon default to fulfill the covenants therein contained, "It should be lawful for the said J., party of the first part or her heirs or assigns, and she or they, or any of them, are hereby authorized and empowered to re-enter into and upon said lot of land and premises" and resume possession thereof. Default having occurred on the part of the church, the heirs of J. upon her death conveyed the property in dispute to E. The church then commenced an action to recover possession of the property from J.'s assignees, and one of the defenses interposed was that they as assignees, could take advantage of such breach, but the Supreme Court said:

> "The conditions in the deed here under consideration are conditions subsequent and no one but the grantor or his heirs can take advantage of the breach of such conditions. The deed is not void on breach of the conditions, but becomes so only when the grantor or his heir enters; or, if actual entry is impossi-

ble by the grantor or his heirs setting up claim to the property. Hammond v. Railroad, 15 S. C., 34. It is true, in the deed under consideration, it is expressly provided that upon breach of condition, the grantor 'or his heirs and assigns' are authorized to re-enter and without notice evict any person found in possession, but it seems to be well established that parties to such conditions are not allowed to alter the settled rule of law on the subject and give the assignee of the grantor the right to avail himself of such breach. Ruch v. Rock Island, 97 U. S., 696. Until actual breach of a condition subsequent and entry, or action equivalent to entry, when entry is not possible, the grantor or his heir has only a possibility of acquiring an interest in the land in the future, and a mere possibility of future acquisition of the title cannot be conveyed or assigned." (p. 256.)

In this particular instance the church took the property on condition that it would erect a building, and with the right of re-entry on part of the grantor, "his heirs or assigns," in case of default. In the case at bar there was also an absolute deed given with the reservation that on default of the University to buy the Dean property and erect a memorial thereon, Mayer or "his heirs or assigns" should have the right to demand a reconveyance which is clearly equivalent to a right of entry. Upon default of the Washington Loan and Trust Company to voluntarily reconvey, as has occurred, the heir is left to his right to make demand and follow it up, as has been done by this litigation. In the church case just cited the heirs of the original grantor after breach on the part of the church conveyed the property to a third person who took possession, but the Supreme Court of South Carolina said that at most all that the original grantor had was "A possibility of acquiring an interest in the land in the future *and a mere possibility of future acquisition of title cannot be conveyed*

or assigned," and therefore the assignee took no title. In the case at bar, Mayer had conveyed absolutely his fee and all he had at the time of his death was the possibility of again acquiring the land, and this possibility as has been shown above, as well as by all the authorities, is not such an interest as can be assigned or devised. Furthermore, in each case it was expressly provided that the property should upon default in complying with the conditions, revert to the grantor, *his heirs or assigns,* and notwithstanding such provision the court held the assignee could take no interest in the property.

It should be borne in mind that the Trust Company holds the Chevy Chase property by virtue of a deed in fee, and as appears by the collateral agreement and the pleadings it was empowered to sell and convey the property to one Gates in the event that he should avail himself of a certain option of purchase, and the proceeds of $185,000 to be derived therefrom was to be held by the Trust Company in lieu of the property (R., p. 5); it was also required to collect the rents, keep the property in good repair and condition, and pay the taxes (R., pp. 30-31), thus having a specific and active duty to perform in relation thereto. The University on its part accepted the terms of the trust as set forth in the collateral agreement by the signature of its president and secretary (R., p. 6), and proceeded to comply with the terms pursuant to which it was to receive the conveyance, by disposing of the Van Ness property, and by resolution of its trustees selected the Dean site as required therein (R., p. 33).

It will be noted therefore that Mr. Mayer parted with every vestige of title or interest in the property and in its control or management, and transferred the same to the Trust Company with the single reservation that in the event the University did not finally acquire the Dean site the Chevy Chase property was to be reconveyed to him.

Certainly, prior to his death he could not convey the fee because that was outstanding in the Trust Company; he could not repossess himself of the property in any way until the University had defaulted under the terms pursuant to which it was conveyed. Could he convey or assign a positive interest in the property? If so, the grantee would receive only the right to enter and possess the property in the event that the University defaulted, which right we have seen, passes to the heir and cannot be assigned. It certainly is a most uncertain, undetermined interest and one which clearly would not be susceptible of barter or sale.

An equitable interest is defined in 15 Cyc., 1087, as "such an interest as a Court of Equity can pursue and appropriate to the discharge of debts." Was the possibility that the University would not acquire the Dean property 19 months after Mr. Mayer's death, such an interest as could be disposed of "to the discharge of debts" at the time of his death? Certainly, Mr. Mayer thought that the University would comply with the conditions pursuant to which it would become entitled to the Chevy Chase property, and all that remained in him at that time was the mere possibility that the Chevy Chase property might revert to him. Could the Court subject such an intangible, uncertain right towards the discharge of debts? Under an execution which must be assumed to have been levied as of the date of his death, the property could not be taken for the fee was in the Trust Company. If the University had acquired the Dean property it would have received a deed for the Chevy Chase property, in which event nothing would have come back to Mr. Mayer. This possibility could not be assigned at the time of his death for in effect it would be a mere gamble, if we may use the expression, as to whether the Chevy Chase property would be returned to him. It is earn-

estly submitted that this possibility, as we have before seen, is not assignable or devisable, but would pass to the heir.

While not directly analogous, still as having some bearing upon the interest remaining in Mr. Mayer and the possibility of its assignment, the authorities are numerous to the effect that where a person sells property, a vendor's lien for the deferred purchase price arises. In Maryland, where the Chevy Chase property is located, the Court in the case of Iglehart vs. Armiger, 1 Bland's Chancery, 519, 524, said:

> "But an equitable lien is an encumbrance upon land, which can only be held by a vendor; and although assets may be marshaled, so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet *no third person can, as assignee of the vendor,* derive any benefit from such lien; nor can it, like a bond or mortgage, be assigned; because it is not expressed in writing, or in any separate contract; but exists only as an inseparable equitable incident of the contract of purchase; and is raised by construction of equity, in favor of the vendor only."

The University having accepted the terms pursuant to which the property was conveyed to the Trust Company, the natural presumption arises that it would comply with the conditions which would entitle it to the Chevy Chase property. Thus, in the case of *In re* Hart, 168 N. Y., 640 (61 App. Div., 593), the Court said:

> "The intention of the testatrix, as we understand it, was that if the Hart sisters assented to the conditions of making the Third Street house their residence, preserving and taking care of the portraits and permitting them to remain upon the premises, and not let or underlet such premises, that then the residuary estate should go to them in absolute ownership, for the gift

of the residuary estate is made to depend upon the *acceptance* of the devise of the realty, and not upon the performance of any of those conditions which can only operate after acceptance, and the devise once accepted, a presumption will be indulged that the other conditions will be complied with * * * the conditions following the acceptance of the gift, we think, can only be regarded as conditions subsequent, for the breach of which a right of re-entry is given to the heirs of the testatrix. * * *"

See also Uppington v. Corrigan, 151 N. Y., 143.

ESTATE COULD NOT PASS UNDER WILL.

In Upington v. Corrigan, 151 N. Y., 143, the entire question was carefully considered. The suit was an action of ejectment to recover certain lands conveyed on condition that the property should be used for church purposes. The grantor died leaving a will, whereby she disposed of her estate giving a residuary legatee all her property and estate not otherwise effectually disposed of. The plaintiffs were the heirs at law of the original grantor. It was contended, based upon certain early Massachusetts decisions, now overruled by later cases holding otherwise, that the right of action for breach of a condition subsequent passed under the will to the devisees and that the heirs at law could not recover. The court disposes of the matter as follows:

"The question is, can the plaintiff, claiming as heir at law of Mrs. Davey, maintain this action to recover the possession of the premises in question for the breach of the express condition in her grant; *or has such a right passed under Mrs. Davey's will to her residuary legatee?* The learned counsel for the appellant has argued, with ability and with force, against the plaintiff's right and the contention which he makes is that an interest remained in the grantor, which, being

descendible to her heirs, was made devisable by the Revised Statutes, and, therefore, passed under her will. If it is true that the plaintiff must rest her right to enter for breach of the condition upon the descent of some estate or interest left in the grantor, then, I think, the appellants' contention is right and this action should fail. But if, on the other hand, and as argued for the respondents, the plaintiff has the right to enter, *not through the operation of the law of the descent, but merely representatively*, as heir at law, and the rule at common law has not been changed by our statutes, then, I think, we will find ourselves obliged to conclude that the devisee of Mrs. Davey was incapable of possessing a right of entry, and that it belonged solely to her privies in blood.

"At common law, the benefit of such a condition in a grant of real estate could be reserved only to the grantor and his heirs. *It was not considered to be a devisable interest* in the grantor and the right of re-entry for a breach could not be assigned to a stranger. It was a non-assignable right and no other person than the grantor, or his heir, could take advantage of a condition which required a re-entry in order to revest the former estate.

* * * * * * * * * * *

"The appellant, feeling bound to concede that the right of re-entry was not devisable at common law, claims that the Revised Statutes have altered the law, by the provision that 'every estate and interest in real property descendible to heirs may be devised.' (2 R. S., 57, Sec. 2.) Undoubtedly, this language of the Statute of Wills is as comprehensive as it can be to cover real interests; but we are remitted, nevertheless, to the inquiry, whether, here, what the grantor had with reference to the estate she had granted amounted in law to an estate or interest in the real property and therein lies the difficulty. *At common law it was only a possibility of reverter and not a reversion.* (4 Kent, 370; Martin v. Strachan, 5 Term. Reports, 107). Until the happening of the breach of the express con-

dition in the deed and a revesting of the estate through re-entry, the whole title was in the grantee. Have the Revised Statutes changed the grantor's status?"

The court then considered the provisions of the Statutes defining estates in real property, such provisions being almost precisely the same as those in force in this District, and said:

"We would be without warrant in asserting the existence of any estate in Mrs. Davey in the premises granted to Hughes, whether at common law, or under the Revised Statutes. She had an election to enter for condition broken and she could release her right to do so. To those rights her heirs, after her decease, succeeded *by force of representation and not by descent.* There was no estate upon which the Statute of Descents could operate; but as heirs, there devolved upon them the bundle or aggregate of the rights which resided in and survived the death of the grantor, their ancestor.

* * * * * * * * * *

"In this case, as it is in every case of a deed of the fee upon condition subsequent, the grantor parted with every interest and estate in the real property conveyed. That was her intention, within the legal presumption from the terms of the deed, and it was, also, the legal presumption that the condition would be performed by the grantee. That which the grantor retained was never regarded as an interest in real property, or as an assignable chose in action, and cannot be deemed such through any construction of our statute. Until the law is changed by some legislation, it must be regarded as still the settled rule that no one can take advantage of the breach of a condition subsequent, annexed to the grant of a fee, but the grantor or his heirs; or, in the case of an artificial person, its successors."

In Church v. Young, 130 N. C., 8, Harris conveyed certain land to certain trustees, in trust for a church sub-

ject to a condition that title should revert if the land should not be used for church purposes. Before forfeiture, Harris died leaving a last will and testament in which he undertook to devise all of his property of every kind and description not specifically mentioned in his will. The devisees, before breach of condition, conveyed their interests in the land and the grantees sought to recover for failure to perform the condition. The court held that after the grant and before re-entry the grantor had nothing that he could convey by his will; that at common law, before condition broken, the estate would revert to the heir at law and was not assignable. At the time the will was executed there was a law in North Carolina which provided expressly that rights of entry for conditions broken could be devised. Nevertheless, the court held that the proper construction of the statute limited the rights of entry that could be devised to such as the testator had at the time of his death; that as the condition had not been broken in his life time he had no right of entry but a mere possibility of reverter.

The court said:

> "This evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry *while living*. This seems to us manifestly the proper construction of this statute —such rights as he has 'at the time of his death.' And, besides, this being manifestly the proper construction of the statute, it puts the statute in harmony with the plainest principles of law governing the rights of property, as it cannot be supposed that the Legislature intended to authorize a testator *to will what he did not have*."

In the case of Goodright v. Forrester, 8 East 552, 566, Lord Ellenborough held that a right of entry was not devisable at common law.

In the case of Schulenberg v. Harriman, 88 U. S., 44 (21 Wall), above referred to, the facts were practically the same as those in the case at bar. After deciding that the condition in that case was a condition subsequent, as above shown, the court proceeded to decide that no one could take advantage of the non-performance of the condition but the grantor or his heirs. In dealing with that proposition the court said:

> "And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor *or his heirs,* or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point with hardly an exception, are all one way from the Year Books down."

In Ruch v. Rock Island, 97 U. S., 693, a dedication was made of land for school and churches. Upon failure to use the land for these purposes the assignees of the original owner, to whom the interest of the dedicator had been conveyed, brought suit to recover the land. The conveyance was by the children of the dedicator, who were his sole heirs at law. The court held that the grants, though made by the heirs at law, conveyed no title and the grantees were not entitled to recover, and in the opinion said:

> "A few words as to the erroneous point in the charge will be sufficient. John W. Spencer was one of the original proprietors and one of the dedicators. He owned at the time of the dedication three-eighths of the premises. A conveyance was made to the plaintiff by his two children, who were his sole heirs at law. The plaintiff asked the court to instruct the jury

that if his contention as to the facts was correct he was entitled to recover; and the court in the charge given instructed accordingly. It was not denied by the plaintiff that the tile had passed, and that the estate had vested by the dedication. If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force, until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and *after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger.* Conceding the facts to have been as claimed, by the plaintiff in error, this was fatal to his right to recover, and the jury should have been so instructed."

In the case just cited this court went further than it is necessary to go in disposing of the case at bar. It will be noted that in that case the deed provided that upon forfeiture for breach of condition subsequent the estate should revert to the grantors, "their heirs or assigns." Those are the identical words used in the agreement in this case. In the case decided by the Supreme Court, after the death of the grantor, but before forfeiture, the heirs had all undertaken to make a conveyance of the possibility of reverter or right of entry, and the court held that even the heirs at law could not make such conveyance until after breach and re-entry. It seems to us that this case controls the case at bar in every respect.

It is believed the foregoing argument demonstrates that the possibility of reverter remaining in a grantor after the grant of an estate upon condition subsequent and before breach, is not devisable but devolves upon the heir at law. We believe, however, that the nature of this transaction was such as to leave even a less interest in the grantor, if

such a thing be possible, than in the case of an ordinary grant upon a condition subsequent referred to in the authorities. By his absolute deed in fee every vestige of title in the grant was extinguished. In all the cases cited in support of our contention, the interest or possibility or whatever it may be called, that remained in the grantor, was reserved, if we may so speak, *in the conveyance itself* and *required no formal reconveyance* to revest title; that is to say, a full fee simple title revested upon re-entry without any reconveyance of any character. In this case no interest was reserved by the grantor; no right of re-entry was reserved. By the terms of the agreement his interest and estate was not to revive upon failure of the University to perform the condition, but only after a *formal reconveyance* of the property by the trustee. Moreover, the right to reconveyance did not arise in the lifetime of the testator, and in fact not until 19 months after his death, and the actual reconveyance has not yet been made.

CASES IN OPPOSITION BASED ON STATUTE.

The learned counsel for the American Security & Trust Co., in substantiation of his claim that the Chevy Chase property passed to that company as trustee, under the will, has heretofore cited the case of Hayden v. Inhabitants of Stoughton, 5 Pick., 528, and Austin v. Cambridgeport Parish, 21 Pick., 215, as supporting his view that the interest remaining in the grantor, before forfeiture, after a grant of lands upon condition subsequent, passes under the testator's will and did not descend to the heir at law. Neither one of these cases has any application to the case at bar.

The case in 5 Pick. seems to support the position contended for, but in reality does not, as we shall see.

In the case in 21 Pick., 215, it appears from the argu-

ment of counsel that in Massachusetts the estate would have revested immediately in the testator if he had lived without entry; that an entry is not required in that State in leases on condition, and the difference between a lease and a feoffment, namely, livery of seisin, is removed by their registry act. (P. 219.)

In the case in 21 Pick., 223, the case in 5 Pick. was referred to and the Supreme Court states:

> "The case of Hayden v. Stoughton, 5 Pick., 528, is more fully in point, *as giving a construction to our statute authorizing devises,* and seems to be entirely decisive of this question."

In the same case the court says that under the laws of Massachusetts in force at the time no entry was necessary to revest the estate, and on page 224, the court further said:

> *"By the provision of the Revised Statutes* great and *important changes* have been introduced into our system in relation to real actions. * * * The demandant is no longer required to prove an actual entry under his title in those cases where such entry was necessary at common law."

The court cites the statute. In other words, from what has been stated, it is apparent that the common law had been changed in Massachusetts by statute and the decision of both of the cases cited was based upon and controlled by the construction of the statutes of Massachusetts authorizing devises.

Tiedeman on Real Property, in a note to Section 277, says that the Massachusetts cases cited by counsel, 5 Pickering and 21 Pickering, are merely based upon a "local rule in Massachusetts."

In Sexton v. Chicago Storage Co., 129 Ill., 331, the court, in dealing with the question of assignability of the esate remaining in the grantor after a grant upon condition subsequent, but before forfeiture, says:

> "But this is held upon the ground, that under the decisions of that court (Massachusetts) the right to re-enter and forfeit the lease is a contingent reversionary estate in the property, the court having previously held, in Austin v. Cambridgeport Parish, 21 Pick., 215, Brattle Square Church v. Grant, 3 Gray, 142, that where an estate is conveyed, to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a *local statute* (see Tiedeman on Real Prop., Note 1 to Sec. 277, and Note 1, on p. 904, 6 Am. & Eng. Ency. of Law): but whether this be true or not, *the decisions are plainly contrary to the principles of the common law.*"

In St. J. & St. L. R. Co. v. Co., 135 Mo., 192, the court cites with approval the case of Schulenberg v. Harriman, *supra,* and in referring to 21 Pick., 215, and 3 Gray, 142, says:

> "But these decisions of the Massachusetts courts have no support in the common law. The right of entry for condition broken is not an estate in lands or even a possibility of reverter; it is a mere chose in action."

Moreover, if in view of what has been stated, the two cases in Pickering heretofore relied upon by counsel, can be considered as holding that a right of re-entry *before* condition broken, may be assigned or devised, nevertheless they have been overruled by later decisions, notwithstand-

ing the statute relating to wills which the court held, in 21 Pickering, controlled both cases.

The case cited in 5 Pick. was decided in 1827, and the one in 21 Pick. in 1838, while in Guild v. Richards, 16 Gray, 317, decided in 1860, which was a case where there was a breach of the condition, but before the grantor re-entered, he conveyed his right, the court held in a very carefully considered opinion that a right of entry could not be alienated and that the grantee of the right had no standing until re-entry made. The entire matter is fully discussed on pages 317-319.

To the same effect is the later case of Rice v. R. R., 12 Allen (94 Mass.), 141, decided in 1866. The syllabus in that case is as follows: "The right or possibility of reverter which belongs to a grantor of land on condition subsequent is extinguished by a conveyance thereof by deed to a third person before entry for breach of condition, even though such conveyance be to a son of the grantor, who upon the grantor's death becomes his hear," on the ground that he is estopped from making claim having conveyed his interest.

In the case of Locke v. Hale, 165 Mass., 20, it appeared that a parcel of land was granted upon a condition, with reversion to the grantor, his heirs and assigns, in case of breach. An assignee *before breach* sought to recover the land conveyed, basing his right upon the word "assigns" in the reversion. The Supreme Court held:

> "The defendant has placed some stress on the use of the word 'assigns,' in the provision creating the encumbrance. *The right of entry for breach of a condition subsequent is not assignable,* and if the provision is to be regarded as creating a condition subsequent the word was inapt."

The learned counsel also referred to the case of Hambleton v. Darrington, 36 Md., 434, as supporting his contention, that such an interest as remained in Mayer after the conveyance to the Trust Company, was a devisable interest under the residuary clause of the will. On behalf of the complainant it is submitted that the case is not in point and that it would be a stretch of imagination to assume that by its decision in that case the Court of Appeals of Maryland intended to decide, without a single reference to the many cases bearing upon the subject, that a mere possibility of reverter before condition broken could be assigned or devised.

In that case it appears that Rachael Watson devised and bequeathed the residue of her interest to Z. Woolen in trust for her son, with a proviso that upon the death of her son without issue the estate should go to Woolen, his heirs and assigns absolutely. The question was whether under this will Woolen acquired an interest which could be devised.

In the first place, it will be observed, as stated in the argument of counsel (p. 438), the trust fund in controversy was made up entirely of *personalty* and not real estate. In the next place, the point now under consideration *was not contested*, as the court says (p. 443), "As the petitioners and respondents claim under Z. Woolen * * * *it might be assumed* that the interest of their testator or intestate was descendable and devisable."

In the third place, it will be noted the very *same instrument* that created the estate upon condition also contained a *limitation over* in case it did not vest. That, of course, created a conditional limitation which is essentially and fundamentally different from a mere right of entry before breach of condition subsequent.

"When a condition subsequent *is followed by a gift over* upon the non-performance or other breach *it becomes a conditional limitation.*"

4 Kent, 126.

2 Jarman on Wills, 6th Ed., Note p. 6.

The difference is material *because at common law only the heir could take advantage of a breach of condition,* while a stranger can have the benefit, without entry, of a conditional limitation.

2 Jarman on Wills, 6th Ed., Note, p. 6.

Because, therefore, in Hambleton v. Darrington, the case related to personalty, secondly, because the point at issue in this case was not contested, and thirdly, because the interest of Woolen was a conditional limitation, the case has no application and is no authority against the proposition now contended for.

The nearest approach to the question we have been able to find in Maryland is in a recent decision of Dawson v. Western Md. R. Co., 107 Md., 70. In that case Rowland conveyed certain property to the Canal Company in consideration and on condition that it should make provision for a basin thereon connected with a canal, to be constructed through the land. In this case appellant held title to Rowland's lands by mesne conveyance, and the Canal Company sold the canal to appellee, who closed up the basin. Appellant thereupon prayed that the railroad company be required to restore the basin and maintain the same. While the case went off on another point the court said:

"If the provision in the deed be treated as a condition, it was a condition subsequent, and the property would revert to the heirs of the grantors, and not to the appellants [the assigns of Rowland of the property], if the condition be broken." (p. 306.)

MARYLAND STATUTORY PROVISIONS.

The real property involved is located in Maryland, and the only statutory provisions in that State that have any bearing upon the subject at all, are Sec. 307, Article 93, of the Md. Code of 1888, p. 1414, which is identical with Sec. 314, of the same article of the Code of 1904, which provides as follows:

> "All lands, tenements and hereditaments, which might pass by deed, *and* which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs or other representatives, except estates tail, and all goods, chattels, monies, rights, credits, or personal property of any kind, *which might pass by deed*, bill of sale, assignment or delivery, shall be subject to be disposed of, transferred and passed by his or her last will or codicil under the following restrictions."

Section 315, formerly 308, provides as follows:

> "No will, testament or codicil shall be effectual *to create any interest* or perpetuity or make any limitation or appoint any uses not now permitted by the Constitution or laws of this State."

Section 329, formerly 321, article 93 of the Code, is as follows:

> "Every last will and testament executed, in due form of law after the first day of June, 1850, shall pass all the real estate which the testator had at the time of his death."

Section 314, formerly 307, above referred to, does not change the law in any respect because it merely permits the devise of such an interest which might pass by deed

and as we have shown in Maryland such an interest as that under consideration could not pass by deed.

Section 329, formerly Sec. 321, which provides that all the real estate owned by a testator at the time of his death, shall pass by his will, does not change or alter the law with respect to the kind of interest that might be devised or its nature or extent.

In Rizer v. Perry, 58 Md., 121, 137, Chief Justice Alvey in disposing of the case, referred to Section 321, Article 93, of the Code of Maryland and said, "but it has never been supposed that it was the design of that provision to pass the real estate of the testator irrespective of his real intention. * * * The effect of the decision is to reassert the presumption in favor of the heir."

In Backus v. Presbyterian Assn., 77 Md., 60, the court referred to Section 314, Article 93 of the Code, which provides that unless words of limitation are added the devise will cover the fee, says this clause in no manner changed the construction of devises of real estate in regard to the nature and extent of the estates devised, except to change the common law rule that an estate given by a general devise, without words of perpetuity or limitation, conferred a life estate only.

Section 1623 of the Code of the District of Columbia provides as follows:

> "All lands, tenements, and hereditaments, and personal estate which might pass by deed or gift, *or* which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives, shall be subject to be disposed of, transferred, and passed by his or her last will, testament, or codicil, under the following restrictions."

Now it will be observed this section of the Code of the District of Columbia is radically different from Section 314, Article 93 of the Maryland laws. In the Maryland

law, the lands that may be devised are expressly limited to those "which might pass by deed *and* which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs."

In the District of Columbia, it is apparent Section 1623 was taken from Section 314, Article 93, of the Maryland laws, but was materially changed. The lands which may be devised in the District of Columbia are those which might pass by deed *or* which would, in case of intestacy, descend to or devolve on heirs. In one instance the conjunctive "and" is used while in the other the disjunctive "or" is used. Moreover the Maryland law specifically deals with "rights" that may be devised and expressly limits such rights to such as "might pass by deed."

As shown by the authorities cited, both in Maryland and elsewhere, where the common law is in force, a mere possibility of reverter is not such a right as could be assigned or conveyed by deed. For some purpose or reason the District of Columbia law makes no mention of "rights" and for that reason it has not changed the law in respect to such rights.

Sections 1011 *et seq.*, of the Code of the District of Columbia define what estates may be held in land in the District of Columbia. These provisions are not found in the law of Maryland, but even if they were found therein and even if they are to be considered in connection with the disposition of the case on hearing, they do not in any respect change the common law in reference to the devisability of a possibility of reverter.

These provisions of the Code of the District of Columbia were taken bodily, word for word, from the laws of the State of New York. The Court of Appeals of New York had occasion to consider these provisions very carefully for the purpose of determining the identical question at bar and in Upington v. Corrigan, 151 N. Y., 143, here-

inbefore quoted, consider the matter elaborately and with the utmost care and came to the conclusion that the statute referred to did not change the common law in this respect, that the interest remaining in the grantor was not an estate and could not be devised or assigned.

While there are no Maryland authorities directly in point, we are relieved from all difficulty by a legislative determination of the entire question. Section 307 of the Maryland Code, above quoted, contained the law in the year 1907, with reference to the property which might be devised at the date of the conveyance of this property by Mr. Mayer for the use of the University, as well as at the time of his death. This section was identical with Section 314 of the Code of 1904, but subsequent to Mr. Mayer's death, was amended by the Act of March 18, 1908, Ch. 84 (Laws of Maryland, 1908, p. 264), and now reads as follows:

> "(307) All lands, tenements and hereditaments which might pass by deed, and which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs or other representatives, except estates tail, and all goods, chattels, monies, rights, credits or personal property of any kind which might pass by deed, bill of sale, assignment or delivery, *and all rights of entry for condition broken, and all rights and possibilities of reverter* shall be subject to be disposed of, transferred and passed by his or her last will or codicil, *and any testator devising real or personal property subject to a condition or conditions, may devise or bequeath the right of entry or reverter which may arise on breach of such condition or conditions,* under the following restrictions:
>
> "Sec. 2. And be it further enacted, that this act shall take effect from the date of its passage. Approved March 18, 1908."

The part in italics were added by this act.

It will be noted that the statute now in force provides specifically that all "rights of entry *for condition broken*" shall be subject to be disposed of by will, and further there may be devised or bequeathed "the right of entry or reverter which may arise *on breach* of such condition or conditions." Thus for the first time under the laws of Maryland is recognized the right to devise a right of entry, but this right is not unlimited but is restricted to such rights *after breach* of the condition. The breach of the condition in the case at bar had not occurred at the time of Mr. Mayer's death and even under this liberal statute, which did not become a law until a year after his death, it could not have been the subject of a devise, because the breach had not occurred at the time of his death.

That the Code was so amended that a mere possibility of reverter will now pass by will, clearly indicates that prior to such amendatory legislation the profession and the courts have been of the opinion that such an interest would not pass by a devise.

Irrespective of any decision upon the matter as this property is located in Maryland this amendment of the statute should determine absolutely the question that the Chevy Chase property was not such as could pass under the will, under the law as in force at the time of Mr. Mayer's death.

NO INTENTION TO DEVISE THIS PROPERTY.

There is no presumption in favor of an intention on the part of the testator to deprive his heir at law of his real estate. Such an intent must be clear and free from doubt.

In Rizer v. Perry, 58 Md., 121, 137, the court reaffirmed the decision of Chief Justice Alvey, who said with refer-

ence to an earlier decision: "The effect of the decision in Rea v. Twilley is to reassert the presumption in favor of the heir."

In Bourke v. Boone, 94 Md., 477, the court reasserted the presumption in favor of the heir and held that notwithstanding the statute of Maryland relating to wills, the heir is not to be disinherited "except by express words or by necessary implication."

While the admitted facts set forth in the pleadings concerning the situation of the testator with reference to the execution of this agreement and with reference to his ownership of property at the time of executing his will and at the time of his death, cannot control unambiguous references contained in his will, they are properly to be considered in determining to what property the words used were intended to apply.

There are other circumstances enforcing this view. It is apparent from the pleadings the testator was interested in the enterprise conducted by Gates upon the Chevy Chase property. That enterprise was scientific and the agreement refers to an option to purchase and authorizes its extension. The property was of substantial value. The bill avers, and it is not denied, that at the time of executing his will and continuously thereafter until his death, Mayer believed that the University would acquire the Chevy Chase property. The University prior to his death had in fact taken steps to sell its Van Ness property for the purpose of acquiring it, and its board of trustees had selected the Dean property, as required under the gift. He had no expectation whatever of ever having the property come back to him. Now, it is inconceivable, under the circumstances, that if he considered he was dealing with this property as his own, that he expected to resume possession and ownership thereof, that he would have made no mention in his

will of the Gates enterprise, of the collateral agreement, or of the Chevy Chase property in any way, or that he should have left no instructions for its disposition, for its improvement or for its sale, or for the extension of the option?

Now it appears that the deed and agreement relating to the Chevy Chase property were executed on February 5, 1907. The will of Mr. Mayer was executed on February 15, 1907, or ten days after the agreement. *At the time of executing the will the previous conveyance of the Chevy Chase property must have been fresh in the recollection of the testator.* The two transactions are so near together as to be practically contemporaneous and should be read together, particularly when we adopt the reasonable view that the testator must have been considering the terms of his will some days prior to the execution thereof. If the court puts itself in the place of the testator it seems to us the intention, as expressed in the residuary clause of the will, is clear. Mr. Mayer had disposed of the Chevy Chase property by absolute deed under circumstances that must have satisfied him the University would acquire the property. He then made his will, disposing of certain personal property and certain other real property specifically, and then provided that the *rest* and residue of his estate, *not including what he had just disposed of by deed and by will,* should pass to his executor and trustee. Such a view is reasonable and just and fully accords with reason, while at the same time it does no violence to the words used by the testator and is in strict accord with the rule that the presumption in favor of the heir is not to be defeated except by clear words or necessary implication.

Had the testator first executed his will and then made the conveyance of the Chevy Chase property, it might well be assumed that when making his will he was un-

dertaking to deal with the Chevy Chase property as part of his estate, but having *first* parted with it by absolute deed and *then* made his will when he refers to the *rest* and residue merely of his property, the conclusion seems to be irresistible that he had no intention to include in his residuary clause his mere possibility of reverter in the Chevy Chase property.

So also the words used elsewhere in the will are to be considered in arriving at the intention of the testator. We find the testator dealing with personal property of which he was in full *possession* and full *ownership*. We find him dealing with part of his real estate of which he was in actual *possession* and full ownership. In short, we find that the previous provisions of the will deal solely with property, real and personal, of great value, of which he was in actual possession and ownership and over which he had immediate power of disposition and control. The inference necessarily follows, when he refers to the rest of his estate, real and personal, he refers to that part of which he was in actual possession and full ownership, and he was not in full possession, nor did he have full ownership of the Chevy Chase property. But to remove this view from all doubt, the testator himself actually limits the property conveyed by the residuary clause to property of which he was in full possession, his exact words being *"which I now possess."*

The same view that the testator was dealing with property in his full ownership and possession is apparent from the provision immediately following the residuary clause, as follows: "In trust * * * to collect the income, rents, issues and profits thereof and after the payment therefrom of all taxes * * * to apply the net income arising therefrom in the manner following, to wit." How could the trustee under the will collect the income, rents,

issues and profits from the Chevy Chase property? It had neither power nor authority to do so until a reconveyance—certainly not before breach, and in fact has not to this day, more than four years since his death. The testator was obviously referring to property over which the trustee did have control. Moreover, there are no rents or profits from a mere expectancy or possibility of reverter. This makes the inference convincing that the testator was dealing with property in his full possession and ownership at the time he made his will.

The same idea is further enforced by reference to the provision—"In the event however that my said son shall depart this life before me * * * then I direct the executor and trustee to pay over from the balance of my estate," etc. Had the complainant died before the testator leaving no children (he has no children) this provision imposes upon the executor the immediate duty, after due administration, to pay over the balance of the estate, but the trustee could not turn over the Chevy Chase property or pay over the proceeds thereof because until forfeiture of the condition subsequent it would not have been available and the date for forfeiture was left to the discretion of the Washington Loan and Trust Company, and was not exercised until nineteen months after his death.

So that, from these various circumstances, it follows as stated in Hambleton v. Darrington, 36 Md., 446,

> "We think it is a fair deduction from these cases, that whenever it is apparent from the whole will, the testator was dealing with property in possession specifically, the general *residuary clause should be confined to property in which he had a present interest, and not include a mere possibility, coupled with an interest, which might never be realized;* particu-

larly when the broader construction would operate to the prejudice of children and next of kin, and in favor of persons standing in a remote degree of relationship."

This case is stronger than that case because there the possibility was a conditional limitation, coupled with an interest, while here we have a mere possibility of reverter, without interest.

In Doe v. Underdown, Willes, 293, the Chief Justice laid down the rule that when a testator has given away all of his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give anything in those lands to his residuary beneficiary.

In Wright v. Hall, cited in Doe v. Underdown, above referred to, Lord King said:

> "The testator makes his will as if he were to die that moment, and it cannot be presumed that he intended to devise a contingency which afterwards happened and which he could not foresee."

In Hambleton v. Darrington, 36 Md., 434, the interest was a conditional limitation, relating to personalty. It is, however, an authority in support of the complainant's contention that the testator never intended to devise his possibility of reverter in the Chevy Chase property.

In that case, the court said:

> "The effect of the words 'all the rest and residue of my estate' was held to be limited by the words 'chattels, real and personal' succeeding, in the case of Markant v. Twisden, 1 Equity Cases, 211; the latter confining the former to things of a like kind, and *therefore a reversion in lands was excluded.* So

in Doe, dem. Bunny, v. Rout, 7 Taunt, 79, the words 'all my stock in trade and every other thing, my property of what nature or kind soever, to and for her own proper use' were held not to convey land.

"In Walters v. Walters, 3 H. & J., 204, it was held the words 'all the remainder of my estate,' were limited by preceding words to the personal estate, and *the reversion in fee,* not being disposed of, descended to the heir-at-law.

"In McChesney v. Bruce, 1 Md., 346, the words 'all the residue of my estate' were confined to personalty, because the preceding bequests were altogether personal, upon the principle of *'noscitur a sociis';* which is but a modification of the rule, that the meaning of the words is governed by the intention apparent in the whole will.

"In the first case, Ch. J. Chase says, 'In deciding on the operation and effect of these words, the court must consider the whole will for the purpose of ascertaining the intention of the testator.'

"The same reason will apply, not only to the kinds of property whether real or personal, but to the nature of the estate, *whether in possession or expectancy.*

"Cook v. Oakley, 1 Peere Wms., 302, shows that the will made at sea, by a man not aware that he had succeeded to a leasehold estate, by the death of his father, would not pass the leasehold to the legatee under the words 'and all things not before bequeathed,' but should be confined to things *'ejusdem generis.'*

"We think it is a fair deduction from these cases, that whenever it is apparent from the whole will, *the testator was dealing with property in possession specifically, the general residuary clause should be confined to property in which he had a present interest, and not include a mere possibility, coupled with an interest, which might never be realized;* particularly when the broader construction would operate to the prejudice of children and next of kin, and in favor of persons standing in a remoter degree of relationship."

There is another observation that may be considered. By the terms of the agreement it was provided that in the event the University failed to acquire the Dean property, the Chevy Chase property should be reconveyed to Mr. Mayer "his heirs or assigns." The words evidently indicate the nature and extent of the estate to be reconveyed rather than the person to whom the reconveyance should be made. But whether that be so or not, a non-professional man would never have supposed that he was making an assignment of such an interest when executing his will. Had the agreement directed the reconveyance to the testator's heirs, executors, administrators or assigns, the inference would have been different, particularly when we consider the possibility of a sale to Mr. Gates and that the trustee would have had money, instead of property to reconvey. It follows therefore that if these words indicate the person to whom the property should be conveyed, rather than the nature of the estate to be conveyed, that the testator did not have in mind his executor and trustee under his will. This is necessarily so, and the words used in the agreement regarding a reconveyance is practically a direction to reconvey to the heir, inasmuch as the interest of the testator, before breach, was not assignable.

This view is supported by the case of Locke v. Hale, 165 Mass., 20. It appeared that a parcel of land was granted upon a condition, with reversion to the grantor, his heirs and assigns, in case of breach. An assignee before breach sought to recover the land conveyed, basing his right upon the word "assigns" in the reversion. The Supreme Court held:

> "The defendant has placed some stress on the use of the word 'assigns,' in the provision creating the encumbrance. The right of entry *for breach of a condition subsequent is not assignable,* and if the pro-

> vision is to be regarded as creating a condition subsequent the word was inapt. Hopkins v. Smith, 162 Mass., 444. We think that, if it is not to be rejected altogether, it is to be regarded as inserted rather to show that the condition or restriction was a continuing one, than with a purpose to establish an easement or servitude in favor of the premises occupied by Johnson as a residence."

Moreover, to sustain the decision of the lower court and tie up the property here involved until appellant reaches 48 years of age, does violence to the rule of law so frequently laid down by the highest court of the State of Maryland, and as so clearly stated in the case of Mercer v. Safe Deposit Company, 91 Md., 114, that "The law favors the early vesting of estates. This is a familiar rule of law which has been frequently recognized and enforced in the decisions of this court."

We therefore submit that by the residuary clause of the will the testator did not intend to dispose of the Chevy Chase property.

NO INTENTION TO PASS MACHINERY, PLANT AND PATENTS.

A complete answer to the claim that Mr. Mayer intended by the residuary clause of his will to pass this property, lies in the very nature of the property itself transferred by him to the Washington Loan & Trust Company. It consisted not alone of real estate, but of a scientific plant, machinery and other paraphernalia used in the buildings as well as many valuable patents (R., pp. 15, 23-27).

That Mr. Mayer was interested in scientific matters and the advancement of knowledge is apparent from the record, and that as a business man he well knew the value of the machinery and plant at Chevy Chase was materially en-

hanced by its maintenance as a running establishment must be conceded. That he was interested in such matters is further demonstrated beyond peradventure by the fact that he was willing to make this magnificent gift to the University for educational purposes, and that it was his desire that it would be so used and maintained cannot be denied.

Bearing this in mind, it is impossible to conceive that he would have ever permitted it to be turned over to his executor and trustees to be dismantled and by it disposed of as junk, for which alone it would then be valuable.

It is impossible to believe that Mr. Mayer intended in case the University failed to acquire this valuable plant and outfit, that it should pass to the trustee under the residuary clause of his will as stated by the court below. This is particularly true when it is borne in mind that included in the property held by the Washington Loan & Trust Company from Mr. Mayer were 72 American letters patent, 7 English, 4 Canadian and 1 New Zealand (R., pp. 23-27). These patents were of a highly scientific nature with perhaps little or no commercial value. If the court below was correct these patents, to say nothing of the scientific machinery and paraphernalia, pass to the trustee under the will. What power has such trustee with reference to their disposition? It certainly would have no right under the will to dispose of them as a gift. Are they to be held until the son reaches 48 years, if so, through the lapse of nearly 16 years they would be valueless, if not long expired under the law. Is the trustee to sell them, and if so will the estate be enriched by more than a pittance though costing thousands of dollars? Is it not much more reasonable to assume that had Mr. Mayer intended that this property was to pass under the residuary clause of his will, considering his evident interest in scientific and educational work, that he would have made some mention therein of so valuable a portion of his estate?

We submit that the very thought that this plant was to be dismantled, would never have entered his mind and could not have at the time of making his will. If the value of this plant and machinery was inconsequential, there might have been some question whether the failure to mention it was not intentional, but such is not the case.

Is it not reasonable to suppose that in making his will Mr. Mayer had in mind the disposition of the property then actually in his possession and not that which he had ten days prior thereto otherwise disposed of; and is it not equally reasonable to assume that he intended by his silence in the will, that it should pass to his only child as heir (in the event of a default on the part of the University), in the confident expectation that he would make a wise disposition, certainly of this scientific apparatus, paraphernalia and patents, in order that they might redound to the advancement of knowledge and not become absolutely wasted, as must of necessity be the case if they pass to the trustee under the will.

APT WORDS WERE NOT USED.

The residuary clause of the will provides that the rest and residue of the testator's estate, *"which I now possess,* or which may hereafter be acquired by me," should go to his executor and trustee.

The interest in the Chevy Chase property remaining in Mr. Mayer after the execution of his deed was not even a legal expectancy, such an expectancy within the meaning of the law, being something that becomes vested upon the happening of a condition *without the necessity of a formal reconveyance.* The testator limits his residuary devise "to his estate." We have shown that the testator was referring to the rest and residue of his estate which he had not previously disposed of, which of course ex-

cludes the Chevy Chase property. Moreover, he refers to estate, which, although a very broad term, yet as ordinarily understood and as understood by this testator was certainly not intended to cover a mere possibility of reverter or reconveyance. If we consider that he used the word in its technical sense, then under the decision in the case of Upington v. Corrigan, *supra,* and the cases heretofore cited, we find that such an interest is not an "estate." It would seem to follow that the testator by the use of the word "estate" did not intend to cover this possibility for the reason that "estate" does not include such a possibility.

Then again, as if to emphasize this view we find the testator using a restricted residuary clause. The residuary clause used by this testator is not the clause commonly used which extends to and covers all right and interests of every nature. As stated by the Court of Appeals of Maryland, in Cole v. Ensor, 3 Md., 452, where the testator used the words "consisting of" after his residuary bequest and devise, that such words restrict the words "rest and residue."

So here, instead of resting after using the expression "residue of my estate," the testator proceeds to restrict the same by the addition of the words "which I now possess or which may hereafter be acquired by me." Having so restricted this devise, it is clear that the testator was not possessed of the Chevy Chase property, either at the time the will was executed or at the time of his death nor did he thereafter in his lifetime acquire the same. Did the testator, on the 15th day of February, within a week after parting with the title to the Chevy Chase property "now possess" it? Instead of enforcing the rule of construction in favor of the heir, to hold that he thereby intended to deal with the Chevy Chase property, *which he did not possess,* is to violate the rule. It not only vio-

lates the rule of construction, but it does violence to the words used. While such words have a broad meaning and broad application at times, in the light of the circumstances surrounding the testator at the time of the execution of this will and in the light of the nature of his interest in the Chevy Chase property, no doubt can remain that if he did intend to devise the Chevy Chase property he did not use apt words for the purpose. In the District of Columbia, where we have a statute defining various kinds of estate, we find (Sec. 1017 of the Code) an estate in possession, which is what the testator refers to in his will and gives to his trustee, is one in which "the owner has an *immediate right* to the possession of the land."

If we are dealing with the matter therefore according to general principles of law, as there is no controlling statute in Maryland, or if we deal with it under the statute in the District of Columbia, in which jurisdiction the testator was domiciled, we find that his interest in the Chevy Chase property was not an estate in possession, that he did not "now possess" it, to use the words of the will, because, to quote the words of the District statute, he did not have "an immediate right to the possession of the land."

With great deference, it is submitted that the learned court below bases its opinion upon three erroneous premises:

A. That the testator owned a tangible and substantial equitable estate.

B. That his residuary devise contained apt words to dispose of such an interest.

C. That the condition contained in the collateral agreement was a condition precedent instead of subsequent.

Inevitably, if, as appellant contends, these premises or either of them were or was erroneous, the whole reason-

ing of the opinion fails and the conclusion reached must be erroneous.

Upon a consideration of the whole record and upon principle and the authorities cited, it is respectfully submitted that the decree below should be reversed, and the cause remanded to the court below with directions to reverse the decree of the trial court and to remand the cause to that court with directions to vacate its decree dismissing the bill and to enter a decree for the conveyance to the appellant by the appellee, the Washington Loan & Trust Company, of the Chevy Chase property, as well as the personal property including the patents as prayed in his bill.

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EDWIN C. BRANDENBURG,
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F. WALTER BRANDENBURG,
Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 77.

THEODORE A. MAYER, APPELLANT,

vs.

AMERICAN SECURITY AND TRUST COMPANY, EXECUTOR AND TRUSTEE, ET AL., APPELLEE.

Brief of the American Security and Trust Company, Appellee.

WM. F. MATTINGLY,
Attorney for American Security and Trust Co., Executor and Trustee, Appellee.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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AMERICAN SECURITY AND TRUST COMPANY, EXECUTOR AND TRUSTEE, ET AL., APPELLEE.

Brief of the American Security and Trust Company, Appellee.

This case is a very simple one. Theodore J. Mayer, by deed dated February 5, 1907, conveyed certain real and personal property to the Washington Loan and Trust Company in fee, taking back from the Trust Company a declaration of the trusts upon which the property was held.

On February 15, 1907, Theodore J. Mayer executed his will. He died March 12, 1907, and his will was admitted to probate and record on March 16, 1907.

Considering the deed from Mayer to the Washington Loan and Trust Company and the declaration of trust by it as one paper, as the law holds should be done, it practically amounts to this:

Theodore J. Mayer, the testator, conveyed certain property at Chevy Chase, Md., to the Washington Loan

and Trust Company in trust to convey the same to the George Washington University "when and at such time as the University shall acquire a fee simple title to the property known as the Dean or Oak Lawn property," in the county of Washington, D. C., as a site for its university buildings and shall abandon the Van Ness property, now owned by it, as the location of said University.

Upon the conveyance of the Dean or Oak Lawn property to the University, it shall agree in writing, by authority of its board of trustees, to erect upon said Dean or Oak Lawn property, as a part of its group of university buildings, a building of stone and brick to be used for educational purposes and to be designated "The Susanna Mayer Memorial."

> "In the event of the failure of the University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the trustee, then said property so as aforesaid conveyed to the trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs or assigns."

The legal effect of this conveyance in trust was to put the legal title to the property in the Washington Loan and Trust Company, leaving the equitable title in the grantor, subject to be divested by the George Washington University within a reasonable time acquiring the Dean or Oak Lawn property as a site for its university buildings.

This equitable estate remaining in the testator was clearly devisable.

The Washington Loan and Trust Company fixed upon October 15, 1908, as the reasonable time within which

the University was to acquire the Dean site. On that date the University notified the Trust Company that the owners of the Dean property refused to sell to the University as they did not wish to dispose of it, and that it was therefore impossible for the University to perform the condition named in the trust.

The Will.

The testator by his will, after making a number of charitable bequests, devises and bequeaths to his son certain real and personal estate. Then follows the general residuary clause to the American Security and Trust Company in trust to pay to his son $300 per month until he attains the age of 33 years, when he is to receive $15,000. At 36 years of age he is to receive $15,000; and at 39 years, $30,000. At 42 years, $30,000; at 45 years, $30,000; and at 48 years he is to receive all the remaining trust estate absolutely in fee.

Should the son die before he shall attain the age of 48 years, leaving no child or children surviving or descendants of such, then the executor and trustee is to pay over the balance of the estate to a number of eleemosynary institutions named in the will.

It is submitted that the cases where the donor conveys directly to the donee upon condition and cases of mere possibility of reverter have no application to the case at bar, yet if the testator's estate in this property was a contingency coupled with an interest or a possibility coupled with an interest, and it was all that and more, then it was devisable and passed to the residuary legatee.

4 Kent's Com., 261* states the law as follows:

> "All contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent and are devisable."

The leading English case upon the subject is Jones *vs.* Roe, 3 Term Rep., 88.

See, also—

2 Williams Saunders, 338 k.
Doe *vs.* Weatherby, 11 East, 322.
Williams *vs.* Thomas, 12 East, 141.
Hayden *vs.* Stoughton, 5 Pick., 528.
Clapp *vs.* Stoughton, 10 Pick., 463.
Austin *vs.* Cambridgeport Parish, 21 Pick., 215.

Suppose the testator had lived until after October 15, 1908, the Trust Company would have reconveyed the property to him, or, whether it did or not, the entire title would have been in him, and would undoubtedly have passed under the residuary clause of the will.

While it is the claim of this appellee that the testator owned the equitable estate in the property in question, which was undoubtedly devisable and passed under the residuary clause of the will, yet if by possibility it should be held not to be that, then it must have been a contingent estate or possibility coupled with an interest which was also devisable.

It is respectfully submitted that the decree below should be affirmed.

WM. F. MATTINGLY,
Solicitor for American Security and Trust Co., Executor and Trustee, Appellee.

Maryland Code of 1904.

Sec. 314. "All lands, tenements, and hereditaments, which might pass by deed, and which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs, or other representatives, except estates tail, and all goods, chattels, monies, rights, credits, or personal property of any kind, which might pass by deed, bill of sale, assignment or delivery, shall be subject to be disposed of, transferred and passed by his or her last will or codicil, under the following restrictions."

MAYER *v.* AMERICAN SECURITY & TRUST COMPANY, EXECUTOR OF MAYER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 77. Argued December 5, 1911.—Decided December 18, 1911.

Equitable titles are subject to devise and if not specifically bequeathed, form part of the residuary estate.

One of the objects of a residuary clause is to gather up unremembered, as well as uncertain, rights; and the words "all the rest and residue of my estate, real, personal and mixed, which I now possess or which

may hereafter be acquired by me" are sufficient to carry an equitable estate.

33 App. D. C. 391, affirmed.

THE facts are stated in the opinion.

Mr. A. S. Worthington and *Mr. Edwin C. Brandenburg*, with whom *Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* were on the brief, for appellant:

A possibility of reverter is not an interest or estate in land that can be devised or assigned. *Vail* v. *Long Island R. R. Co.*, 106 N. Y. 287; *Towle* v. *Remson*, 70 N. Y. 309; *De Peyster* v. *Michael*, 6 N. Y. 506; *Nicholl* v. *N. Y. & Erie R. R. Co.*, 12 N. Y. 131; *Locke* v. *Hale*, 165 Massachusetts, 20; *Bouvier* v. *Baltimore & N. Y. R. R. Co.*, 67 N. J. Law, 281; *Helms* v. *Helms*, 137 N. Car. 206. See also *Ohio Iron Co.* v. *Auburn Iron Co.*, 64 Minnesota, 407; *Warner* v. *Bennett*, 31 Connecticut, 469; *Highbee* v. *Rodeman*, 129 Indiana, 247; *Berenbroick* v. *St. Luke's Hospital*, 23 App. Div. (N. Y.) 339; Tiedeman on Real Property, § 277; *Sexton* v. *Chicago Storage Co.*, 129 Illinois, 331; *Denver & S. F. Ry. Co.* v. *School District No. 22*, 14 Colorado, 327; and see note 60 L. R. A. 762; *Church* v. *Elliott*, 65 S. Car. 251.

An equitable interest as defined in 15 Cyc. 1087, is "such an interest as a court of equity can pursue and appropriate to the discharge of debts." Certainly this interest does not fall within this definition. As to the law of Maryland where the property is located, see *Iglehart* v. *Armiger*, 1 Bland's Chancery, 519, 524.

The estate could not pass under will. *Upington* v. *Corrigan*, 151 N. Y. 143; *Church* v. *Young*, 130 N. Car. 8; *Goodright* v. *Forrester*, 8 East, 552, 566; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Ruch* v. *Rock Island*, 97 U. S. 693.

The cases cited in opposition are based on statute and do not apply to this property.

Under Maryland statutory provision the property was

not such as could pass under the will, under the law as in force at the time of Mr. Mayer's death.

There is no presumption in favor of an intention on the part of the testator to deprive his heir at law of his real estate. Such an intent must be clear and free from doubt. *Rizer* v. *Perry*, 58 Maryland, 121, 137; *Bourke* v. *Boone*, 94 Maryland, 477; *Hambleton* v. *Darrington*, 36 Maryland, 446; *Doe* v. *Underdown*, Willes, 293.

The words used in the agreement regarding a reconveyance are practically a direction to reconvey to the heir, inasmuch as the interest of the testator, before breach, was not assignable. *Locke* v. *Hale*, 165 Massachusetts, 20.

To tie up the property here involved until appellant reaches forty-eight years of age does violence to the rule of law favoring the early vesting of estates. *Mercer* v. *Safe Deposit Company*, 91 Maryland, 114.

Apt words were not used, and the words used did not include this possibility for the reason that "estate" does not include such a possibility. *Cole* v. *Ensor*, 3 Maryland, 452.

Mr. Wm. F. Mattingly for appellee:

The cases where the donor conveys directly to the donee upon condition and cases of mere possibility of reverter have no application to the case at bar, yet if the testator's estate in this property was a contingency coupled with an interest or a possibility coupled with an interest, and it was all that and more, then it was devisable and formed part of the residuary estate. 4 Kent's Comm. 261; *Jones* v. *Roe*, 3 Term Rep. 88. See also 2 Williams' Saunders, 338*k*; *Doe* v. *Weatherby*, 11 East, 322; *Williams* v. *Thomas*, 12 East, 141; *Hayden* v. *Stoughton*, 5 Pick. 528; *Clapp* v. *Stoughton*, 10 Pick. 463; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215.

Suppose the testator had lived until after October 15, 1908, the trust company would have reconveyed the prop-

erty to him, or, whether it did or not, the entire title would have been in him, and would undoubtedly have passed under the residuary clause of the will. See Maryland Code of 1904, § 314.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill for a conveyance to the plaintiff of a parcel of land to which he claims a right under a trust deed of his father, Theodore J. Mayer. The case was heard on bill and answer, the Supreme Court dismissed the bill, and its decree was affirmed by the Court of Appeals. 33 App. D. C. 391. The facts are these: On February 5, 1907, Mayer conveyed the premises to the Washington Loan and Trust Company and the latter executed a declaration of trust by which it was to convey them to the George Washington University "when and at such times as" the University should comply with certain conditions, by the purchase of certain other specified land, &c. "In the event of the failure of the said University to comply with the terms and conditions of this trust within a reasonable time after the execution of this instrument, which reasonable time is to be determined by the Trustee, when said property, so as aforesaid conveyed to the Trustee, is to be reconveyed to the said Theodore J. Mayer, his heirs and assigns." The word 'when' in the sentence is superfluous, but the meaning is plain. The reasonable time was determined and has elapsed, as is agreed by the University as well as by the Trustee, and the conditions have not been performed, but in March, 1907, before the breach of condition, Mayer died.

Mayer made his will on February 15, 1907, a few days after the trust deed and a month before his death. After pecuniary legacies and a specific devise to the plaintiff of his residence, its contents, etc., he gave the residue of his estate to the American Security and Trust Company

in trust to make various payments to the plaintiff at different stated times, and upon his attaining the age of forty-eight years to convey all of the trust fund remaining in its hands to the plaintiff in fee. Then followed gifts to the plaintiff's children in the event of his dying before the testator or before reaching the age of forty-eight, and alternative legacies if he left no children surviving him. The question is whether the property covered by the trust deed should be conveyed to the plaintiff now or falls into the residue to be held upon the trusts created by the will.

The argument for the appellant is that the grantor, Mayer, retained a mere possibility of reverter, which was not devisable, and that if he had more than that still he did not devise it by his will. But the answer is plain. Of course the grantee, the Washington Loan and Trust Company, got the legal title in fee, but by its declaration of trust and its answer it disavowed any beneficial interest, and if the equitable title was in Mayer it was subject to devise by him. But it necessarily was either in Mayer or in the George Washington University, and the courts below were quite right in holding that all rights of the University were subject to a condition precedent that never was fulfilled. The beginning of its rights was to be by conveyance 'when and at such time as' the University should have made the required purchase. Or, as stated in another clause not yet quoted, "This declaration of trust is intended to set forth the terms and conditions under which the said Chevy Chase property, or the proceeds thereof, is to be conveyed or given to the said George Washington University." That it was not given until those terms and conditions were complied with could not be said more plainly. We should add that the University by its answer makes no claim either to the land or to the profits between the date of the deed and the loss of its rights.

Mayer then at his death had a present equitable right to

the land subject only to be defeated by an event that has not happened, and we see as little ground for doubting that he disposed of it as there is for denying that he had it. The residuary clause is in the usual form, "All the rest and residue of my estate, real, personal and mixed, which I now possess or which may hereafter be acquired by me"; amply sufficient to carry the equitable estate. No doubt Mayer thought that the Chevy Chase property would go another way, but it manifestly was not certain, and moreover one of the objects of a residuary clause is to gather up unremembered as well as uncertain rights.

Decree affirmed.